NKS Distributors, Inc., d/b/a Century Wine and Spirits *and* General Teamsters Local Union No. 326, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO

Delaware Beverage Co. *and* General Teamsters Local Union No. 326, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO

Eugene M. Tigani, Steven D. Tigani, J. Paul Tigani, J. Vincent Tigani, Jr., F. Gregory Tigani, J. Paul Tigani (U/W of Joseph P. Tigani), and Francis G. Tigani, a Partnership d/b/a Standard Distributing Co. *and* General Teamsters Local Union No. 326, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO

N.K.S. Distributors, Inc. *and* General Teamsters Local Union No. 326, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO

West Coast Industrial Relations Association, Inc. *and* General Teamsters Local Union No. 326, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO. Cases 4–CA–17616–1, 4–CA–17616–2, 4–CA–17616–3, 4–CA–17888, 4–CA–17616–4, 4–CA–17889, 4–CA–17616–1, 4–CA–17616–2, 4–CA–17616–3, and 4–CA–17616–4

August 26, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND OVIATT

On September 20, 1989, Administrative Law Judge Marvin Roth issued the attached decision. The Acting General Counsel and the Charging Party filed exceptions and supporting briefs. The Respondents filed an answering brief, cross-exceptions, and a supporting brief. The Charging Party filed an opposition to the Respondents' cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] only to the extent consistent with this Decision and Order.

The judge found, inter alia, that the Respondent Distributors did not violate Section 8(a)(5) and (1) of the Act as alleged by repudiating their collective-bargaining agreements with the Union and implementing new terms and conditions of employment for unit employees, and that Respondent NKS did not violate Section 8(a)(5) and (1) of the Act when it unilaterally instituted an employee stock purchase plan. We disagree with the judge on both issues. As set forth in section I below, we find that the Distributors violated Section 8(a)(5) and (1) at least insofar as they breached any contractual provisions that were not reopened in the negotiations for contract modifications. We further explain why a remand is necessary for resolving certain related questions. Our grounds for reversing the judge's dismissal of the allegation regarding NKS' implementation of a stock purchase plan are set forth in section II.

I. RESPONDENT DISTRIBUTORS' REPUDIATION OF CONTRACTS AND SUBSEQUENT UNILATERAL CHANGES

A. *Factual Findings*

The Respondents Century Wine and Spirits (Century); Delaware Beverage Co. (Delaware Beverage); Standard Distributing Company (Standard); and N.K.S. Distributors (NKS) (collectively the Distributors) are engaged in the wholesale distribution of alcoholic beverages and have facilities at various locations in the State of Delaware. Respondent West Coast is a labor relations consultant and provided services as the Distributors' agent, within the meaning of Section 2(13) of the Act.

[1] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We adopt the judge's conclusion that the Respondents violated Sec. 8(a)(1) of the Act by interrogating employment applicant Richard Maule concerning his union membership. The judge concluded, based on his dismissal of the other unfair labor practice allegations, that this interrogation was an isolated occurrence which did not warrant a remedial order. However, in light of the additional violations we find below, we conclude that a remedial order for the unlawful interrogation is warranted.

We adopt the judge's finding that Respondent Standard did not violate Sec. 8(a)(5) and (1) of the Act under the circumstances here by unilaterally reducing its workweek from 5 days to 4 days for certain Wilmington unit employees. The judge dismissed this allegation in part because of his conclusion that the contract had terminated, and as the Acting General Counsel neither alleged nor proved the absence of impasse, the Respondents had lawfully implemented its final offer, which included language stating that a 5-day workweek was not guaranteed. Because, as discussed infra, we reverse the judge's finding that the contract terminated and that implementation of Respondent Distributors' final offer was lawful, we rely only on the judge's alternative ground for dismissing this allegation. Specifically, we find that the parties never interpreted the contract as a guarantee of a 5-day workweek. Standard's Dover facility normally operated on a 4-day workweek, and during slow periods at its normally 5-day Wilmington facility Standard would sometimes notify employees not to report to work on Mondays. The Union never objected to these practices. When the Union learned that Standard had announced that certain Wilmington employees would work a 4-day workweek, the Union did not request bargaining over the matter. We agree with the judge that under these circumstances Respondent Standard did not violate the Act by its unilateral implementation of a revised workweek for certain Wilmington employees.

The Union has had a bargaining relationship with the Distributors for at least 20 years. In 1982 and again in 1985, the Distributors negotiated individual contracts with the Union, through coordinated bargaining. The most recent agreements, for the period April 1, 1985, through March 31, 1988, are separate, self-contained contracts with most provisions identical for all Distributors.[3] The contract contains the following provisions with respect to duration:

ARTICLE 49

DURATION

Section 1.

The Agreement shall be in full force and effect from April 1, 1985, to and including March 31, 1988, and shall continue from year to year thereafter unless written notice of desire to cancel or terminate the Agreement is served by either party upon the other at least sixty (60) days prior to the date of expiration.

Section 2.

Where no such cancellation or termination is served and the parties desire to continue said Agreement but also desire to negotiate changes or revisions in this Agreement, either party may serve upon the other a notice at least sixty (60) days prior to March 31, 1988 or March 31st of any subsequent contract year, advising that such party desires to revise or change terms of such Agreement.

Section 3.

The Local Union as representative of the employees or the signator Employer shall each have the right to unilaterally determine when to engage in economic recourse (strike or lockout) on or after April 1, 1988 unless agreed to the contrary.

Section 4.

Revisions agreed upon or ordered shall be effective as of April 1, 1988 or April 1st of any subsequent contract year.

Section 5.

In the event of an inadvertent failure by either party to give the notice set forth in Sections 1 and 2 of this Article, such party may give notice at any time prior to the termination or automatic renewal date of this Agreement. If a notice is given in accordance with the provisions of this Section, the expiration date of this Agreement shall be the sixty-first (61st) day following such notice.

[3] These individual, essentially identical 1985–1988 contracts will be referred to collectively as the contract.

The language of article 49 was taken from the Teamsters' National Master Freight Agreement which, prior to 1982, covered the Distributors' employees as part of a multiemployer bargaining unit.

Negotiations for the most recent contract began when the Union, through its National Freight Industry Negotiating Committee, sent a letter dated October 30, 1984, to the Distributors notifying them of the Union's ''desire to revise or change the terms and conditions of such Agreement . . . for the contract period commencing April 1, 1985, as provided in [the Duration Article], Section 2, thereof.'' By letter dated November 28, 1984, the Distributors notified the Union to ''Please consider this letter as notice of termination of the agreement.'' The parties then agreed to a contract extension while negotiations continued beyond the April 1, 1985 expiration date, and eventually agreed on a new contract with the language of article 49 included as shown above.

The Union initiated the most recent negotiations by sending the Distributors letters dated January 4, 1988,[4] stating the following:

> Please accept this letter as notice of our intent to change and/or modify the current labor agreement which expires on 3/31/88.
>
> This notice is being sent as provided for in the agreement and if there are any questions, please call this office.

The Distributors responded with letters to the Union stating that they would be represented by Chris Thomas of Respondent West Coast, and inviting the Union to contact Thomas as soon as possible in order to avoid bargaining beyond the expiration date. Negotiations commenced on March 4 with Thomas negotiating for the Distributors and Union President Michael Ciabottoni and Attorney Hugh Beins negotiating for the Union.

Each side submitted initial contract proposals which covered a wide range of matters, including wages and fringe benefits. At the March 4 and March 8 sessions, Thomas said that the Distributors would not agree to an extension of the existing contract beyond the contract's expiration date. At the fifth negotiating session on March 29, the Distributors presented a counterproposal, the following portion of which Thomas read aloud: ''With respect to the expiration of the contract the employers will not agree to either an informal or formal extension of the contract. We suggest the Union consult with their counsel as to the legal significance of this position'' (emphasis in original). When asked what this meant, Thomas stated that the union-security, checkoff, and arbitration obligations of the contract would die with the expiration of the contract. Beins replied that Thomas was wrong, but he did not offer an

[4] All dates are 1988 unless otherwise indicated.

explanation for why Thomas was wrong, and Thomas did not ask for an explanation.[5]

By letter dated April 13, Thomas informed Beins that as of April 17, the Distributors would no longer honor the contractual union-security and checkoff provisions, but that they would continue to abide by all other terms and conditions of ''the expired contract,'' subject to recent Board decisions regarding the scope of an employer's postexpiration obligation to arbitrate grievances. The parties met again on April 19 and Beins asserted that the Distributors' refusal to honor the union-security and checkoff provisions was a breach of contract and an unfair labor practice.

The Distributors stopped checking off dues sometime in late April. On April 28 the Union filed grievances with the Distributors, alleging unilateral changes in terms and conditions of employment, including the failure to abide by the union-security and checkoff provisions. The Distributors took the position that the contract expired on April 1, the parties had not agreed to extend the contract beyond that date, and therefore the Distributors would refuse to arbitrate these grievances, or any other post-April 1 grievances which did not ripen or accrue prior to April 1.[6] Beins responded in a May 20 letter to Thomas asserting, inter alia, that the Distributors had agreed both before and after the expiration date to continue the contract in effect and that there was no impasse. By letter dated May 26, Thomas responded to Beins, asserting that he disagreed with Beins' contract extension theory and with Beins' suggestion that there was no impasse in negotiations. Thomas asserted that an impasse had been reached.

Thereafter, the parties maintained their respective positions and on September 19 the Distributors unilaterally implemented their final offer, which provided for numerous contractual changes including reduced wage rates, deletion of COLAs, changed health and pension coverage, the addition of a management-rights clause, and a progressive discipline policy. Also on September 19 Respondent Standard unilaterally implemented a retirement plan. On December 1 the Distributors unilaterally implemented health insurance plans. On January 1, 1989, Respondent NKS unilaterally implemented a profit-sharing plan.

The Union filed its initial unfair labor practice charge in this proceeding on September 26, alleging, inter alia, that the Distributors had repudiated the contract and implemented new terms and conditions of employment. On December 8, Thomas wrote to Ciabattoni that the Union had apparently raised a question with the Board about whether the Distributors had ''in fact terminated or cancelled the contract as required by Article 49 of the expired agreement.'' Thomas asserted that at the first bargaining session on March 4, in response to a question posed by Beins, he had stated that the Distributors would not agree to extend the contract beyond its March 31 termination, and that this position was subsequently confirmed in writing to the Union at the March 29 negotiating session. Thomas went on to state in this letter that ''consequently,'' in accordance with article 49, section 5, the Distributors would agree to deduct for April and May any union dues or fees provided for in the union-security and checkoff provisions of the contract.

Thomas wrote to Beins again on January 17, 1989. He asserted that it was the Distributors' position that the contract had been terminated pursuant to the written notice Thomas gave at the March 29 negotiating session, and thus by operation of section 5 the contract expired on May 28. Thomas further stated that notwithstanding the Distributors' belief that the contract expired on May 28, and in order to protect the Distributors' rights, this January 17, 1989 letter was to serve as a formal notice, ''in accordance with Article 49, Section 1 of the collective bargaining agreements,'' of the Distributors' intent to terminate the contract as of April 1, 1989, ''if in fact any such agreements presently exist, or are subsequently found by the Board or the courts to exist at the present time.'' Thomas reiterated that this letter was not to be construed as an abandonment of the Distributors' position that the contract actually expired on May 28, 1988, i.e., as a result of the Distributors' asserted written notice under section 5, provided to the Union at the March 29 negotiating session.

As noted above, the contract provides that a party may give notice under section 5 in the event of an inadvertent failure by such party to give notice under section 1 at least 60 days prior to the date of expiration. Thomas testified that in the 1988 negotiations he had not mistakenly failed to give notice under article 49, section 1.

B. *The Judge's Conclusions*

The judge found that the Distributors did not violate the Act by failing to abide by the terms of the 1985–1988 contract after March 31, 1988. More specifically, the judge found that the contract terminated on April 1, and thus the Distributors were free to cease giving effect to the union-security, checkoff, and arbitration provisions of the contract. Further, the judge found that, as the Acting General Counsel had not alleged and had not proven that the parties were not at an im-

[5] Ciabattoni testified that according to his and Beins' interpretation of the contract, the contract would automatically renew on April 1 for an additional year because neither party gave notice of desire ''to cancel or terminate'' the contract pursuant to sec. 1 of the duration article, except that absent agreement of the parties, they would by reason of sec. 3 be free to engage in a strike or lockout on or after that date. Ciabattoni and Beins agreed not to disclose their interpretation of the contract to anyone unless and until the Union filed unfair labor practice charges, except that Beins would disclose it to Thomas if Thomas asked him to.

[6] Thomas took this same position with respect to the Union's requests to arbitrate other matters.

passe in bargaining when the Distributors unilaterally implemented their final offer in September, the Acting General Counsel failed to prove that such unilateral implementations were unlawful.

C. *Discussion*

The judge found that although no party gave written notice of desire to cancel or terminate the contract under article 49, section 1, this did not automatically result in the contract's being continued in full force and effect past March 31. More specifically, the judge found that the section 1 provisions were not the exclusive contractual method for canceling or terminating the contract. He found that section 2 also provided the parties with a contractual method for canceling or terminating the contract, and that the contract was in this instance terminated pursuant to section 2.

In finding that the contract was not automatically continued in effect under section 1 when neither party served a section 1 notice of desire to cancel or terminate the contract, the judge found that section 2 established a precondition for continuation of the contract—i.e., the mutual desire of both parties to continue the contract in effect, subject to any particular changes or revisions which the parties might negotiate. Thus, the judge found that the parties could also effect a cancellation or termination of the contract under section 2 by (1) *not* having a mutual ''desire to continue'' the contract, and by (2) either party's expressing a desire to revise or change the contract.

Citing *Paterson Parchment Paper Co. v. Papermakers*, 191 F.2d 252 (3d Cir. 1951); *Oakland Press Co*., 229 NLRB 476 (1977), enfd. 735 F.2d 969 (6th Cir. 1984); *Champaign County Contractors Assn*., 210 NLRB 467 (1974); *New Jersey Esso Employees Assn. (Exxon Co.)*, 275 NLRB 216 (1985); and *South Texas Chapter, AGC*, 190 NLRB 383 (1971), the judge concluded that a timely notice of a desire to negotiate changes or revisions in the contract operates to terminate the contract as of its expiration date, absent a contrary agreement by the parties. The judge distinguished the principal cases relied on by the Acting General Counsel, *KCW Furniture Co*., 247 NLRB 541 (1980), enfd. 634 F.2d 436 (9th Cir. 1980); and *Robert A. Barnes, Inc*., 268 NLRB 343 (1983), on the basis that the contract clauses at issue in those cases included language specifically providing that a ''Notice of Opening'' could not operate to terminate the contract, and that only a ''Notice of Termination'' or a mutual written agreement of the parties could serve to terminate the contract.

Applying his interpretation of the contract and the above precedents to the situation at hand, the judge found that the actions of the parties operated to terminate the contract under section 2. In making this finding, the judge concluded that because the Distributors had stated from the start of negotiations that they would not agree to any extension of the contract, the requirement of mutual desire for continuation of the contract, which the judge perceived was a condition for continuing the contract under section 2, was not met, and therefore the Union's timely section 2 notice of its desire to change or modify the contract actually served to terminate the contract effective April 1. Accordingly, although the Distributors ceased giving effect to the contractual union-security and checkoff provisions, refused to arbitrate grievances arising after March 31, and implemented their final offer in September, the judge found that the Distributors were free to do so in the absence of a contention or showing by the Acting General Counsel that the parties were not by then at impasse.

We agree with the judge that it is section 2 of article 49 that governs the question of the continuation vel non of the contract after the March 31 expiration date. Neither party gave a termination notice pursuant to section 1, and, for reasons set forth below, we reject the Distributors' contention that on March 29 they gave a notice under section 5 that caused the termination of the contract 60 days thereafter. We also disagree with the judge's conclusion that the Union's January 4 notice to modify, pursuant to section 2, effectively terminated the entire contract as of March 31. Neither do we agree with the Union, however, that the entire contract automatically renewed for another year on that date. Rather, for reasons set forth below, we construe section 2, read in the context of the entire article, as having the following effects on the parties' actions: (1) the Union's January 4 notice and subsequent bargaining by the parties reopened the provisions specified by the parties in their proposals for modification; (2) provisions that were *not* reopened for bargaining automatically renewed for another year on March 31, but (3) the reopened provisions did not automatically renew but remained subject to modification through the normal collective-bargaining process. Under this view of article 49, as we further explain, the Respondent can be found to have violated Section 8(a)(5) insofar as it breached any unreopened provisions between March 31, 1988, and March 31, 1989, but it was free to implement its own final proposals on reopened provisions if the parties had previously bargained to impasse on those reopened items.

1. Neither party satisfied the express contractual requirement for termination of the contract pursuant to section 1 of Article 49 because neither party served the other with a timely written notice of desire to cancel or terminate the contract. Under section 5, however, a party which intends to give a section 1 notice but inadvertently fails to do so ''may give notice at any time prior to the termination or automatic renewal date'' of the agreement. The agreement will then expire on the

61st day after such notice. The Distributors contend that they gave such notice. We disagree.

First, the Distributors have failed to establish an essential condition for a section 5 notice, i.e., proof that it had intended, but inadvertently failed, to give a timely section 1 notice. The Distributors put on no evidence to show an attempt to serve a section 1 termination notice that went awry owing to some inattention to the matter. Indeed, the testimony of the Distributors' main witness on this issue is to the contrary. Thus, negotiator Thomas testified as follows: that he was responsible for serving article 49 notices on behalf of the Distributors; that he did not give the Union any notice under article 49, section 1; that he never advised the Union that he had made a mistake in failing to give appropriate written notice under article 49; and that he did not in fact make a mistake in failing to give notice under article 49.

Second, although the Distributors belatedly claimed on December 8 and again on January 17, 1989, that their March 29 counterproposal constituted a notice of termination under section 5, it is clear from the record that the Distributors manifested no such intent concerning that counterproposal at the time they presented it. When Thomas gave what the Respondent now claims was a section 5 notice on March 29, he made no reference to section 5. He simply explained that the intended effect of such notice was that the union-security, dues-checkoff, and arbitration obligations would die with the expiration of the contract. More significantly, while the express terms of section 5 state that the effect of a section 5 notice is to extend the contract to the 61st day following the date the section 5 notice is given, the Distributors stopped honoring those obligations in April, well in advance of the 61st day following the March 29 section 5 notice. It was not until December 8, after the Union had filed its charge, that the Distributors first claimed that the March 29 notice was a section 5 notice of termination and that they would accordingly honor the checkoff and arbitration obligations retroactively for the previous April and May. We conclude that the Distributors' December 8 letter was an after-the-fact attempt to claim that the March 29 counterproposal was a notice served under section 5 of article 49. Thus, it is clear that neither the intent nor the effect of the Distributors' March 29 notice was to terminate the contract pursuant to section 5. Because the parties did not invoke either of the provisions governing contract termination, we find that the contract did not terminate on March 31.

2. Having rejected the Distributors' claim that they gave a valid notice of termination under article 49, we must next determine the effect of a notice that was indisputably given, i.e., the Union's January 4 notice, pursuant to section 2, to ''change and/or modify the current labor agreement which expires on 3/31/88.'' We reject the Union's contention that, because this was the only article 49 notice given, the contract automatically renewed in toto on the day after March 31. Likewise, we reject the Distributors' argument and the judge's finding that the section 2 notice resulted in the contract's complete termination on March 31. For the following reasons, we construe section 2 of article 49 as a contract reopener clause under which provisions opened up for renegotiation are effectively terminated, but the contract renews for another year as to unreopened provisions. In so construing the section, we apply the principles set forth in *Speedrack, Inc*., 293 NLRB 1054 (1989). Accord: *Southern California Edison Co*., 295 NLRB 203 (1989), affd. sub nom. *Electrical Workers IBEW Local 47 v. NLRB*, 927 F.2d 635, 644–645 (D.C. Cir. 1991).

a. In *Speedrack*, we held that an employer did not violate Section 8(a)(5) and (1) of the Act when it unilaterally implemented its final offer on wages after invoking a midterm wage reopener provision of its contract, fulfilling certain procedural requirements set out in Section 8(d) of the Act, and bargaining to impasse with the union. We found that the employer's invocation of the wage reopener provision effected a termination of the wage provisions in the contract, thereby entitling the employer to unilaterally implement its final offer on wage modifications after impasse. We predicated those holdings in *Speedrack* on policies underlying Sections 8(a)(5) and 8(d) of the Act, which, we concluded, warranted construing reopener provisions so as to afford parties freedom of action in reopener negotiations and to avoid inappropriately ''imposing conditions that would turn reopener bargaining into little more than a charade that would barely differentiate it from the kinds of discussion that may lawfully occur even in the absence of a reopener.'' Id., at 1055. This was only a principle of contract interpretation, however, and we acknowledged that parties could preclude such a result by agreeing to clear contract language manifesting a contrary intent. Id. at fn. 5. We summarized the Speedrack principles as follows (id. at 1055–1056):

> Thus, in cases involving terminated contract provisions—whether terminated through a reopener or terminated through the expiration of a contract—we will assume, in the absence of evidence of a contrary intent, that the parties intended to reserve to themselves the freedom of action that is a normal part of the collective-bargaining process when contractual provisions governing the matters on the bargaining table are not in effect. This means that where the parties have not thus constrained themselves, an employer who observes the procedural requirements of Section 8(d) may implement a proposal on a reopened subject after bargaining to impasse.

We find that section 2 of the instant contract is a reopener provision in that it allows the reopening of provisions for modification through bargaining. We further find that there is no manifestation of mutual intent to place constraints on the freedoms normally enjoyed by parties in collective bargaining. The reference in the first sentence of section 2 to the parties' ''desire to continue said Agreement,'' in the absence of a termination notice, can easily be read as a desire to continue the agreement subject to ''changes or revisions'' in reopened provisions that result from the usual bargaining process, i.e., changes that are either agreed on by the parties or are implemented by a party after impasse. Indeed, section 3 of article 49 is consistent with the view that the parties contemplated a process free of constraints, because it provides that, absent an agreement to the contrary, the Union is free to strike and the Distributors are free to lock out after April 1. This section obviously is intended to operate during section 2 negotiations for modifications, since it would be unnecessary if a section 1 contract termination notice had been given. A section 1 notice would result automatically in the lifting of the no strike/no lockout clause after contract expiration on March 31.

We also find support for our construction in section 4 of the article. Under that provision, any agreed-upon changes to contract terms are deemed retroactive in effect to April 1, the day after the March 31 contract expiration date. This arrangement makes sense only if the old contract did not renew for another year on the expiration date as to reopened terms. Under our construction of article 49, in light of statutory principles under section 8(a)(5) of the Act, the terms and conditions embodied in the various reopened provisions would, with few exceptions, continue in effect after contract expiration until the parties reached either agreement or impasse.[7] In the absence of renewed-for-a-year contract provisions, there is no inconsistency in a retroactive alteration of the status quo pursuant to section 4.

Because we find *Speedrack* applicable to this case, and because we see no language in the contract clearly prohibiting the Distributors from implementing a final offer after impasse is reached on reopened provisions, we find that the Union's invocation of section 2 resulted in the termination of provisions on which the parties proposed modifications prior to the contract expiration date.[8] Accordingly, we conclude, consistent with *Speedrack*, that the Distributors were free to implement their proposals on reopened provisions if impasse was reached.

b. In concluding that *Speedrack* is inapplicable here, our dissenting colleague makes essentially two arguments. She first contends, as do the General Counsel and the Union, that this case is, instead, controlled by *KCW Furniture Co*., 247 NLRB 541, enfd. 634 F.2d 436 (9th Cir. 1980); and *Robert A. Barnes, Inc*., 268 NLRB 343 (1983), cases involving identical contract duration/renewal clauses in which the Board held that the respondent employers acted unlawfully in implementing final proposals in bargaining that followed a notice of opening, as opposed to a notice of termination. Second, she argues that our reading of section 2 of the duration article at issue here renders section 1 of that article meaningless. We disagree with her on both points.

In *Speedrack*, the Board expressly distinguished *KCW Furniture* (and, by necessary implication, *Barnes*) on the ground that in *KCW* the duration clause expressly provided that a notice of opening could not be construed as termination. 293 NLRB 1054 at fn. 12. The clause stated in pertinent part: '''Notice of Opening' is in nowise intended by the parties as a termination of nor shall it in anywise be construed as a termination of this Agreement . . . nor as forestalling automatic renewal as herein provided.'' 247 NLRB at 543. There is no language in article 49 or elsewhere in the agreement at issue in the present case that resembles that express limitation on a reopening notice. Possible implications are simply not equivalent to express language.[9] Our colleague's argument that our interpretation of the contract language renders section 1 meaningless is based on the assumption that we read section 2 as contemplating the possible reopening and alteration of every single clause in the entire agreement. This would mean, she asserts, that a party could achieve the same result with a section 2 notice that it could obtain with a section 1 notice. Although that is theoretically possible, it is not our view of the intent of the parties regarding section 2. We believe they contemplated using section 2 only when planning on modifications (and concomitant opening) of parts of the agreement. If a party sought total contract termination, it would obviously give a section 1 notice. This case does not confront us with an attempt to use a section 2 notice in the manner described by our colleague to forestall the renewal of any contract provision whatsoever, and nothing we say here would require us to

[7] See generally *Laborers Trust Fund v. Advanced Lightweight Concrete Co*., 484 U.S. 539, 544 fn. 6 (1988), and cases there cited. Exceptions to the general rule include union-security, dues-checkoff, and no-strike clauses, and arbitration clauses for purposes other than resolving disputes arising under the expired contract. *Indiana & Michigan Electric Co*., 284 NLRB 53, 55, 60 (1987).

[8] Because there is no evidence that the Union questioned the Distributors' submission of its own proposals in these reopener negotiations, no issue concerning the right of a party other than the one giving the section 2 notice to submit proposals other than counterproposals is presented here.

[9] Member Oviatt intimates no view on how he would decide the question of the extent to which *KCW* and *Robert Barnes* continue to be viable after *Speedrack*. Without suggesting how he would interpret contractual language like that in *KCW* and *Robert Barnes*, Member Oviatt finds that, in any event, the contractual language in *KCW* and *Robert Barnes*, as it related to the parties' intent with respect to termination of the contract, was plainly different from that here.

hold in any future case that article 49 or comparable contract clauses must be read as permitting such a result.

c. Our reading of section 2 as forestalling the automatic renewal of some (but less than all) of the contract provisions also, as noted above, puts us in disagreement with the judge's finding that section 2 provides the parties with an alternative method to section 1 for terminating the entire agreement. Section 2 comes into effect only when neither party has served a section 1 termination notice and therefore the parties do not desire automatic termination of the contract on the expiration date, but they do wish to reopen and renegotiate particular provisions. Section 2 does not address termination of the entire contract. The exclusive contractual provisions governing cancellation or termination of the *contract* (as opposed to cancellation or termination of certain contractual terms) can be found in section 1 (or section 5 when there has been an inadvertent failure to give a section 1 notice).

The judge interpreted the phrase ''and the parties desire to continue said Agreement'' in section 2 as establishing a condition or requirement that both parties must actually desire continuation of the contract in order that a section 2 notice of desire to revise or change the contract not have the effect of canceling or terminating it in toto. A reading of the full phrase introducing section 2, ''Where no such [i.e., section 1] cancellation or termination is served and the parties desire to continue said Agreement but also desire to negotiate changes or revisions in this Agreement'' makes it clear to us that the narrower particular phrase in question does not establish a condition or requirement of mutual desire for continuation of the contract, but rather describes the reasonably inferred circumstance resulting from an absence of an expressed desire under section 1 by either party to cancel the contract. Thus, we find that the section 2 phrase in question is most reasonably interpreted as conveying the sense that where no section 1 notice of cancellation or termination is served and the parties *therefore* desire that the contract continue in effect, they may nevertheless reopen particular provisions of the contract and negotiate changes or revisions to those contractual provisions.

We therefore find that a mutual desire of the parties to continue the contract was not a prerequisite to an effective section 2 notice by the Union of its desire to revise or change the terms of the contract, and that the Union's January 4 notice of its intent to change or modify the contract did not operate to terminate or cancel the entire contract, but rather operated only to terminate certain provisions of the contract.

The five cases relied on by the judge in support of his interpretation of the contract are distinguishable. In two of them, *Paterson v. Papermakers*, supra, and *Oakland Press*, supra, the contract duration clauses provided either for a notice to ''terminate'' (*Paterson*, 191 F.2d at 253) or a notice to ''cancel or terminate'' (*Oakland Press*, 229 NLRB at 478); they contained no references to notices to amend or modify the contracts. The issue was simply whether letters from the unions to the employers that referred to a desire to make changes in the contract could reasonably be construed as termination notices. Because notices to terminate were the only notices contemplated by the agreements, and because in *Oakland Press* a similar letter had been treated by the parties in the past as the equivalent of a termination notice, the holding in each case was that the contracts did not automatically renew on their expiration dates.

In *New Jersey Esso Employees Assn.*, supra, *Champaign County Contractors Assn.*, supra, and *South Texas Chapter, AGC*, supra, the duration clauses included references to notices to modify as well as to notices to terminate, although the references were not placed in separate numbered sections as is the case here. An issue in each case was whether the communications sent by the unions constituted termination notices. The decisions in *Champaign County* and *South Texas Chapter* were later aptly described by the Board in *Oakland Press* as cases in which ''the Board looked through form to substance and found sufficient compliance with the termination clause to foreclose renewal.'' 229 NLRB at 480. The holding in *New Jersey Esso* could be similarly characterized. There the Board held that a letter stating that ''the agreement expires on [the specified date]'' and that the Union desired to meet ''in order to negotiate a new contract'' constituted notice ''in the most clear and precise terms imaginable'' that the Union intended to terminate the contract in order to negotiate a new one, notwithstanding its failure to use the word ''terminate.'' 275 NLRB at 218. In *Champaign County*, in finding that the union's transmission of a copy of the Federal Mediation and Conciliation Service (FMCS) Form 7 sufficed as a notice of termination,[10] the Board relied on (1) past practice in which such a form was invariably sent when termination was intended and (2) the failure of the contract to specify any particular format for the notice. 210 NLRB at 470.[11] In *South Texas Chapter*, the

[10] The FMCS Form 7 is employed to satisfy requirements of Sec. 8(d) of the Act that no party to a collective-bargaining agreement ''shall terminate or modify'' it unless ''the party desiring such termination or modification'' has (1) served on the other party to the contract a written notice of the proposed termination or modification 60 days prior to the expiration date of the contract and (2) notified the FMCS within 30 days after giving the foregoing notice that a dispute exists, if no agreement has been reached by that time.

[11] It is also noteworthy that under the duration clause in *Champaign*, notices to modify and notices to terminate were given equal status as exceptions to the provision calling for year-to-year renewals of the contract after the original expiration date, and thus it could reasonably be read as providing that either type of notice would forestall renewal. In pertinent part the clause provided that the agreement would ''continue in force from year to year'' after the original expiration date ''*except* that by written notice given by either party

Board found that a union letter constituted a notice to terminate because it referred to a desire to ''negotiate for all matters pertaining to wages, hours, and all conditions of employment''; it was deemed a notice to terminate because it was ''a call for negotiation on *all* terms'' 190 NLRB at 386 (emphasis added).

In contrast to all those cases, the judge did not find here that the Union's January 4 letter announcing a desire to ''change and/or modify the current labor agreement,'' was a notice given in an effort to invoke the contract's termination provision. As noted above, he found (with good reason) that the Union's letter constituted a notice under section 2 (notice of desire ''to revise or change terms''), as opposed to a section 1 notice (''notice of desire to cancel or terminate''); and his conclusion that the contract terminated in toto on the expiration date rests entirely on his construction of section 2.[12] Because none of the cases he relied on addresses the question of what effect should be given a notice to modify, as opposed to a notice to terminate, none of them can reasonably be invoked to support his resolution of the issue concerning the meaning of section 2.

3. The Distributors alternatively argue that the complaint should be dismissed because of the defenses of acceptance, estoppel and laches. We do not find merit to any of these alternative arguments.

In asserting their acceptance argument, the Distributors argue that the Union, by its conduct, accepted the Distributors' various notices, during bargaining, stating that they would not agree to an extension of the contract, as effectively discharging the Distributors from any remaining notification requirements under section 1. More specifically, the Distributors contend that the Union acknowledged that the contract expired on March 31 and that by doing so the Union expressed its acceptance that the Distributors' bargaining notices were sufficient to terminate the contract. Further, the Distributors contend that by engaging in negotiations over their proposals, the Union expressed a belief or intention that the contracts were to be terminated rather than amended.

We do not find that either the Union's acknowledgement of the expiration date or its negotiating over the Distributors' contract proposals indicates an acceptance that the contract terminated on March 31. Acknowledgement by the Union that the contract's expiration date was March 31 is not inconsistent with either the Union's theory that the entire contract renewed on April 1, or with our finding that the contract renewed except for the reopened provisions which the parties introduced into negotiations pursuant to section 2 bargaining. Under either theory, the Distributors' refusal to adhere to the union-security, checkoff, and arbitration obligations and their other unilateral changes may have constituted a breach of contract and an unfair labor practice.

Additionally, the fact that the Distributors submitted proposals at the commencement of negotiations is not an indication that the Union accepted the idea that the contracts terminated on March 31. The Union expressed a desire to negotiate changes or revisions. As negotiations involve two sides with opposing interests, it is neither unusual nor significant that both sides would come to the negotiating table with their own proposals. This could occur in the event the parties were negotiating on reopened subjects or in the event the parties were negotiating an entire new contract to replace a previously terminated contract.

The Distributors also alternatively argue that the allegation should be dismissed on the ground of equitable estoppel.[13] In support of this theory, the Distributors contend that they had no way of knowing the Union's position regarding contract termination because Beins and Ciabattoni had a secret agreement to withhold the information; that the Distributors relied in good faith on the Union's conduct consistent with their view that the contract expired on March 31; and that the Distributors took action to their detriment in reliance on the Union's conduct by implementing their final offer, resulting in the instant proceeding.

We are not persuaded by the Distributors' equitable estoppel argument. The Union's references to the contract's expiration date do not manifest a position by the Union that the contract itself terminated on that date. To the contrary, the Union consistently took the position that any unilateral changes would be a breach of contract and an unfair labor practice. The Union engaged in no conduct inconsistent with this position and the Distributors did not ask the Union for an explanation of why it contended that such conduct constituted an unfair labor practice. The Union had no

at least sixty (60) days, but not more than ninety (90) days, prior to July 24th of any year [after the 1973 original expiration date], either party may notify the other of its desire to *amend, modify, or terminate* this agreement.'' 210 NLRB at 468 (emphasis added).

[12] We reject the Distributors' argument in their cross-exceptions that, on the basis of past practice, the Union's transmission of a sec. 2 notice and a notice to the FMCS could reasonably be construed as a notice to terminate. In the first place, the past practice is equivocal and cuts both ways. Thus, while the Union's action in securing a 4-day contract extension in 1982 might suggest that the Union understood its sec. 2 notice to have terminated the contract upon its specified expiration date, a subsequent dispute over the viability of a postexpiration grievance for which no resolution is shown in this record somewhat obscures the significance of that action. As for the 1985 negotiations, if a sec. 2 notice, together with an FMCS notice was tantamount to a notice to terminate the entire agreement upon contract expiration, it is difficult to understand why the Distributors found it necessary to send a sec. 1 notice after the Union had sent a sec. 2 notice. These circumstances are clearly distinguishable from those in *Champaign County Contractors*, supra, in which the past practice relied on was unequivocal and was a practice of 10 years standing.

[13] Citing *Oakland Press Co.*, 266 NLRB 107 (1983), the Distributors note that the elements of equitable estoppel are (1) lack of knowledge and the means to obtain knowledge of the true facts; (2) good faith reliance on the misleading conduct of the party to be estopped; and (3) detriment or prejudice from such reliance.

duty either to volunteer their legal theories or to remind the Distributors that in order to terminate the contract they must give proper notice of termination. The Distributors did not lack the means to ascertain that they had failed to give effective notice of desire to cancel or terminate the contract. In addition to asking the Union for its explanation of its position, the Distributors reasonably could have ascertained this information from the language of the contract itself. Therefore, we find that because there was no inconsistent or misleading conduct by the Union, and because the Distributors did not lack the means to realize they had not given effective notice of termination, a finding of equitable estoppel is not warranted.[14]

Finally, the Distributors raise an alternative argument that the Union should be barred by the doctrine of laches from asserting that the contract was automatically continued.[15] More specifically, the Distributors argue that Ciabattoni and Beins secretly withheld their belief that the agreements had not been properly terminated. This argument, however, ignores the fact that Union promptly put the Distributors on notice that they considered the unilateral changes to be a breach of contract and an unfair labor practice. The Distributors never asked the Union why they considered the changes to be unlawful, and there is no evidence that the Union planned to withhold such information if the Distributors had asked for it. We therefore do not find that the Union's assertions are barred by the doctrine of laches.

4. In sum, the Distributors never gave proper notice under section 1 or section 5 of a desire to cancel or terminate the contract. The defenses of acceptance, estoppel and laches are not applicable. The Union's notice under section 2 of its desire to change or modify the contract did not operate to cancel or terminate the entire contract, but rather operated to reopen and effectively terminate certain provisions of the contract. We find, therefore, that the contract continued in effect beyond the March 31 expiration date, but under the principles of *Speedrack, Inc.*, supra, the Union's section 2 notice of desire to negotiate changes or revisions in the contract effected a termination of the contractual provisions regulating the subjects that the parties introduced into negotiations. Thus, if bargaining over reopened subjects proceeded to impasse, the Distributors were then permitted to implement their final offer regarding those subjects.

Our decision in *Speedrack* did not issue until after the instant hearing had closed. Further, the complaint alleges that the Distributors repudiated the contract and implemented new terms and conditions of employment, not that the contract terminated and the new terms and conditions were implemented prior to impasse. Consequently, the impasse issue was not litigated. As the impasse issue is a critical element of a *Speedrack* analysis, and as the parties did not focus on the existence of impasse and the judge did not make a finding as to whether the parties reached impasse, we find it necessary to remand the case to the judge, with instructions to reopen the record, for the purpose of determining whether, under the contract as we have interpreted it pursuant to contract construction principles set out in *Speedrack*, the Distributors' unilateral implementation of new terms and conditions of employment after the March 31 expiration date of the contract violated Section 8(a)(5) and (1). Specifically, it must be determined (1) what subjects were introduced into negotiations, thereby effecting a termination of contract provisions covering those reopened subjects; (2) whether the Distributors implemented any new terms or failed to honor any continuing contractual provisions that were not related to the subjects opened up for bargaining; (3) whether the parties had reached impasse in their negotiations; and (4) if it is found that the Distributors unlawfully failed to continue to comply with unreopened contractual provisions, whether this or any other conduct tainted the course of bargaining so as to preclude impasse on the subjects that were reopened for bargaining.[16]

Unilateral Institution of a Stock Purchase Plan by NKS

In December 1988, the Anheuser-Busch Company invited Respondent Distributor NKS to participate in a stock purchase plan whereby NKS employees could purchase Anheuser-Busch common stock through the employee payroll deductions, with all brokerage and administrative costs paid by Anheuser-Busch. NKS agreed to enter the program.

NKS posted a notice to its employees dated January 6, 1989,[17] announcing that NKS employees could at their option participate in this stock purchase plan. The notice stated that NKS would purchase the first share of stock for each employee who enrolled in the plan. The notice further stated that interested employees were to complete and return their enrollment cards by

[14] The Distributors appear implicitly to argue that the Union waived its right to object to any failure by the Distributors to give effective notice of termination because the Union did not raise this claim until after negotiations had commenced. We find this argument to be without merit.

[15] Citing *Truck & Dock Services*, 272 NLRB 592, 596 (1984), the Distributors note that the doctrine of laches is recognized when there is unreasonable delay in asserting a right under circumstances prejudicial to the adverse party or where recovery would be prejudicial because of the time delay.

[16] For example, if it is found that the Distributors' refusal to arbitrate grievances, to check off dues, and to honor the union-security provisions of the contract constitute violations of Sec. 8(a)(5) and (1) of the Act, it must be determined whether these violations tainted bargaining so as to preclude impasse. Additionally, if it is found that the Distributors engaged in bad-faith conduct during the negotiations, it must be determined whether such conduct precludes a finding that the parties reached impasse.

[17] The dates in this section of the decision are 1989, unless otherwise indicated.

January 20. NKS never gave notice of the plan to the Union.

Union Business Agent Ciabattoni first became aware of the plan on January 19, when a steward turned in a copy of the notice and an enrollment card to the Union's office. Prior to January 19 at least nine employees signed enrollment cards, and several more employees did so on January 19. The initial enrollment included 24 unit employees. NKS sent in its stock purchase check on January 24, and employee payroll deductions commenced on February 2. The Union never communicated with NKS about this matter, and it took no action concerning it other than to file the instant unfair labor practice charge on February 9.

The judge found that the stock purchase plan constituted a benefit and term and condition of employment that is a mandatory subject of bargaining, and that NKS had a legal obligation to notify the Union of its desire to institute the plan. The judge also found, however, that NKS did not violate Section 8(a)(5) and (1) of the Act because the Union ''slumbered on it rights'' and did not request bargaining over the matter. The judge stated that the Union, by not requesting bargaining over the matter before NKS sent in the check on January 24 or before the payroll deductions began on February 2, had waived its right to bargain.

We agree with the judge that NKS was obligated to notify the Union and provide it with an opportunity to bargain about the stock purchase plan. We do not, however, agree with the judge that the Union waived its right to bargain over the matter. Rather, we find that by the time the Union found out about the stock purchase plan, it was a fait accompli.

It is incumbent on an employer who is going to implement a term of employment, such as the instant employee stock purchase plan, to give timely notice to the employees' representative. To be timely, the notice must be given sufficiently in advance of the implementation to allow the representative a reasonable opportunity to bargain. If the notice is provided too short a time before implementation, then it amounts to nothing more than a notice to the union of a fait accompli. If, however, a union has sufficient notice of a contemplated implementation and does not request bargaining, it waives the right to bargain and no 8(a)(5) violation flows from the employer's unilateral implementation. What constitutes sufficient notice and what constitutes a sufficient request to bargain depends on all the circumstances of a case. *Emhart Industries*, 297 NLRB 215 and cases cited therein (1989).

Applying these principles to the situation at hand, we note that the Union first learned of the employee stock purchase plan almost two weeks after NKS had notified the employees of the plan and had extended them an invitation to participate in it. By the time the Union found out about the plan, at least nine employees had already signed up, and on the day the Union found out, several more did so as well. More significantly, however, we find that NKS actually unilaterally implemented this benefit plan not on January 24, when NKS ultimately sent in its stock purchase check, but much earlier, on January 6, when NKS first announced this benefit plan to the employees and expressly gave them the immediate opportunity to enroll in it—almost 2 weeks before the Union itself got word of it. Under these circumstances, the absence of a Union request to bargain is excused on the grounds that by the time the Union found out about the plan, it was, vis-a-vis the employees, a fait accompli. *Migali Industries*, 285 NLRB 820–821 (1987).

Accordingly, we find that Respondent NKS' unilateral implementation of the employee stock purchase plan violated Section 8(a)(5) and (1) of the Act as alleged.

CONCLUSIONS OF LAW

1. By interrogating employment applicant Richard Maule concerning his union membership, the Respondents Distributors and West Coast violated Section 8(a)(1) of the Act.

2. By unilaterally implementing an employee stock purchase plan without providing the Union with notice and reasonable opportunity to bargain about it, the Respondent Distributor NKS violated Section 8(a)(5) and (1) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, we shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Respondent NKS shall be required, upon request, to bargain in good faith with the Union concerning the implementation of the employee stock purchase plan, and if so requested by the Union, to rescind its unilateral implementation of the plan. Our order should not be construed as requiring Respondent NKS to rescind any such benefits without a request from the Union. See *Vibra-Screw, Inc.*, 301 NLRB 371 fn. 2 (1991). The Respondents shall be required to post the notices attached hereto in the Appendix.

ORDER

The National Labor Relations Board orders that

A. The Respondent, N.K.S Distributors, Inc., d/b/a Century Wine and Spirits, New Castle, Delaware, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating applicants for employment concerning their union membership.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its New Castle, Delaware, facility copies of the attached notice marked ''Appendix A.''[18] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

B. The Respondent, Delaware Beverage Co., New Castle Delaware, its officers, agents, successors, and assigns, shall

1. Cease and Desist from

(a) Interrogating any applicants for employment concerning their union membership.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its New Castle, Delaware facility copies of the attached notice marked ''Appendix B.''[19] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

C. The Respondent, Standard Distributing Co., Wilmington and Dover, Delaware, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating any applicants for employment concerning their union membership.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its Wilmington and Dover facilities copies of the attached notice marked ''Appendix C.''[20] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

D. The Respondent, N.K.S. Distributors, Inc., New Castle and Milford, Delaware, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating applicants for employment concerning their union membership.

(b) Implementing a stock purchase plan for employees without bargaining with the Union about the plan.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union concerning the institution of a stock purchase plan for employees, and if so requested by the Union, rescind its unilateral implementation of the plan.

(b) Post at New Castle and Milford, Delaware facilities copies of the attached notice marked ''Appendix D.''[21] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

E. The Respondent, West Coast Industrial Relations Association, Inc., Los Gatos, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

[19] See fn. 18, supra.

[20] See fn. 18, supra.

[21] See fn. 18, supra.

(a) Interrogating applicants for employment concerning their union membership.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at the Respondent Distributors' Delaware facilities copies of the attached notice marked ''Appendix E.''[22] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the issues raised in this proceeding by the unfair labor practice allegations set forth in paragraphs 15 through 17 (inclusive) and paragraph 21 of the March 28, 1989 consolidated complaint, to the extent amended by the April 4, 1989 amendments to the consolidated complaint, regarding the Respondents' alleged unlawful repudiation of certain provisions of the parties' April 1, 1985–March 31, 1988 collective-bargaining agreement and unilateral implementation of new terms and conditions of employment shall be remanded to Administrative Law Judge Marvin Roth for the purpose of applying the principles of *Speedrack, Inc.*, supra, to these issues, and to reopen the record to take evidence as to

(a) what subjects were introduced by the parties into negotiations during the period January 4 through March 31, 1988 (the contract expiration date), and which contractual provisions covering those subjects were therefore reopened and effectively terminated;

(b) whether the Distributors implemented any new terms or failed to honor any continuing contractual provisions that were not related to subjects that were introduced into the negotiations;

(c) whether the parties had reached impasse in their negotiations prior to the Distributors' implementation of their final offer;

(d) whether the course of bargaining was tainted by the Distributors conduct so as to preclude impasse by a finding, for example, that the Respondent Distributors failed to comply with contractual provisions that were not reopened.

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a supplemental decision containing findings of fact and conclusions of law in light of the Board's remand. Following service of the supplemental decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

[22] See fn. 18, supra.

MEMBER CRACRAFT, concurring in part and dissenting in part.

I agree with my colleagues that the Respondents violated Section 8(a)(1) of the Act by interrogating an employment applicant concerning his union membership, that Respondent Standard did not violate Section 8(a)(5) and (1) of the Act by unilaterally reducing its workweek from 5 days to 4 days for certain Wilmington unit employees, and that Respondent NKS violated Section 8(a)(5) and (1) of the Act by unilaterally implementing a stock purchase plan for employees.

Contrary to my colleagues, however, I find that the Respondent Distributors also violated Sections 8(a)(5) and (1) and 8(d) of the Act by abrogating their contract with the Union and implementing new terms and conditions of employment. I disagree with my colleagues' finding that the instant case is controlled by *Speedrack, Inc.*, 293 NLRB 1054 (1989). Rather, I find the circumstances of the instant case similar to the circumstances in *KCW Furniture Co.*, 247 NLRB 541 (1980), enfd. 634 F.2d 436 (9th Cir. 1980); and *Robert A. Barnes, Inc.*, 268 NLRB 343 (1984). Specifically, I find that the entire contract, with the exception of the no strike/no lockout clause, automatically continued beyond the expiration date because the parties had not sent a notice of termination pursuant to section 1 or section 5 of the duration clause. Consequently, the Union's section 2 notice of desire to negotiate changes or revisions created a negotiating situation whereby the parties could resort to a strike or lockout, but absent an agreement on any changes or modifications the contract remained in effect and thus the Distributors were not free to unilaterally implement new terms and conditions of employment.[1]

Both *KCW* and *Robert A. Barnes* involved facts similar to the facts in the instant case and contractual provisions similar to the contractual provisions at issue in the instant case.[2] In each of those cases, the Board

[1] I agree with my colleagues that the judge incorrectly found that because the parties did not mutually desire to continue the contract in effect, the Union's sec. 2 notice operated to terminate the contract. I also agree with my colleagues that the March 29, 1988 communication stating that the Distributors ''*will not* agree to a formal or informal extension of the contract'' did not constitute a notice of termination pursuant to sec. 5 of the contract.

[2] In both cases, the relevant contractual language stated that the contract shall:

> continue in full force and effect through April 1, 1977 [1982 in *Barnes*], and also thereafter, on a year to year basis, by automatic renewal. Provided however, for the purpose of negotiating alterations in wages and other terms and conditions of employment, either party may open this Agreement or any contract effectuated through automatic renewal by giving written ''Notice of Opening'' not later than sixty (60) days prior to the expiration date. ''Notice of Opening'' is in nowise intended by the parties as a termination of nor shall it in anywise be construed as a termination of this Agreement or any annual contract effectuated through auto-

Continued

found that because neither party had sent a ''Notice of Termination'' (the equivalent of a section 1 notice in the instant contract), the contract remained in effect past the expiration date and the respondent employer had no right to make unilateral changes while negotiating pursuant to a ''Notice of Opening'' (the equivalent of a section 2 notice in the instant contract) sent by the union.

My colleagues, in agreement with the judge, find the instant case distinguishable from *KCW* and *Robert A. Barnes* because the contracts in those cases stated that a '''Notice of Opening' is in nowise intended by the parties . . . as a termination of this Agreement,'' and that ''termination of the Agreement . . . must, to the exclusion of all other methods, be perfected by giving written 'Notice of Termination' . . .'' whereas the instant contract contains no express limitation resembling the wording in *KCW* and *Barnes*.

I find, contrary to the judge and my colleagues, that the instant contract does contain express language that serves the same contractual purpose as that found in *KCW* and *Barnes*. Section 1 clearly instructs the parties as to the exclusive method for how the contract is terminated. Conversely, the contractual language in section 2 neither states nor reasonably implies that a notice of desire to negotiate changes or revisions could operate to forestall automatic continuation of the contract, or any of its provisions, past the expiration date. Rather, the specific language in section 2 referring to the parties' ''desire to continue said Agreement'' in the absence of a notice of termination, means, by its own terms, that *the contract*, not just a fraction of it, continues in effect, thus precluding unilateral changes, even after impasse. Thus, I find that despite the absence of the same specific language found in *KCW* and *Robert A. Barnes*—that a ''Notice of Opening'' (the equivalent of a section 2 notice in the instant case) does not effect a termination of the agreement—the express language of sections 1 and 2 in the instant case, when read together, leads inescapably to the conclusion that only a section 1 notice can effect a termination of the contract, and that therefore a section 2 notice cannot.

The continued validity of *KCW* was affirmed by the Board in *Speedrack* itself, when the Board stated that the holding of *KCW* is ''not inconsistent'' with *Speedrack* because in *KCW* (as well as in the other cases cited) ''the legality of the employer's unilateral action has depended on the specific language of the clause regarding the continuing status of the contract terms.'' *Speedrack*, supra at fn. 12. As stated above, I find the instant case directly on point with *KCW*. As in the *KCW* contract, the instant contract contains clear, express terms regarding termination and renewal of the contract. Also like the *KCW* contract, the instant contract expressly states that when the contract is continued (because neither party has given a section 1 notice) the parties may negotiate changes or revisions to the contract and, during the course of such negotiations, may engage in a strike or lockout. Further, the express terms of the duration clause make it clear that the contract can be terminated only when there has been proper notice of termination pursuant to section 1 or section 5, except that the no-strike/no-lockout clause terminates on the expiration date when a section 2 notice is given. Thus, the contractual language specifically instructs the parties as to how to terminate the contract, and as to what actions they may take when negotiating changes to the contract pursuant to a section 2 notice. With the presence of such express language in the duration clause, there is no basis on which to read into the contract an implicit intent, contrary to the clear terms of section 1, providing for termination of any or all contractual provisions when a section 2 notice is given.

If section 2 was intended to be the kind of termination clause my colleagues have interpreted it to be, it would render the effect of section 1 meaningless. Under the express terms of section 1, a party effectively communicates its desire to continue the contract in effect by not serving a section 1 notice of desire to cancel or terminate it. But under both the judge's and my colleagues' interpretations of the contract, the communicative effect of section 1 is lost because a party would not be able to rely solely on the absence of a section 1 notice from the other party as *the* showing of the other party's desire to continue the contract in effect. More specifically, under my colleagues' interpretation of the contract, a party can simultaneously (a) communicate a desire to continue the contract in effect by simply not sending a section 1 notice, but (b) embark on a course of conduct culminating in the termination of *every substantive provision* in the contract, by giving a section 2 notice. My colleagues' interpretation has stripped the automatic continuation provisions of the contract of their intended effect, because their reading of the contract has allowed the Distributors to unilaterally implement changes to practically every term and condition of employment, even though neither party has satisfied the express requirement for terminating the contract. Under these circumstances, I do not think it is reasonable to construe the contract such that despite the clear, express language of section 1,

matic renewal nor as forestalling automatic renewal as herein provided. The parties reserve the right to economic recourse in negotiations; except during the interval between the giving of Notice of Opening and the expiration date.

Except by mutual written agreement, termination of this Agreement or any annual contract effectuated through automatic renewal, must, to the exclusion of all other methods, be perfected by giving written ''Notice of Termination'' not later than sixty continued continued (60) nor more than ninety (90) days prior to the expiration date, whereon the contract shall, on its expiration date, terminate. Effective termination eliminates automatic renewal.

the following section of the contract allows the parties to act contrary to the express terms of section 1.[3]

I find that *Speedrack* is not applicable to the instant case. *Speedrack* involved negotiations pursuant to a contractual wage reopener provision which is significantly different from the language or purpose of section 2. That wage provision provided that, during the term of the contract, the parties could negotiate a new wage provision to take effect for the remainder of the term of the contract.[4] Thus, absent evidence of any indication otherwise, it was reasonable to treat the invocation of the specific reopener as effectively terminating the wage provision of the contract prior to the contract's expiration date.

The instant contract contains no similar provision. Rather, the duration clause provides that, on expiration of the contract, the parties may either continue the contract in effect without change by doing nothing, or they may engage in one of two types of negotiations. If negotiations are desired, the parties may terminate the existing contract and negotiate a new contract, or the parties may negotiate on the basis that the existing contract remains in effect absent an agreement to modify or change the contractual terms, except that if the parties do not reach agreement by the expiration date, the parties may resort to a strike or a lockout.[5]

The existence of section 3 in the duration clause is indicative of the parties' intent to provide for the contractual terms remaining in effect during the period the parties engage in section 2 bargaining. While section 2 is premised on the fact that the contract continues in effect for another year because neither party has given a section 1 notice, section 3 expressly qualifies section 2 to provide for termination of the no-strike/no-lockout clause when the parties negotiate pursuant to section 2. Thus, it is evident that the contract expressly instructs the parties as to how to treat the existing contract when negotiating pursuant to section 2. By its own terms, the contract provides that where the only notice given is a section 2 notice, the contract remains in effect except that section 3 terminates the no strike/no lockout provision of the contract on the expiration date. Consequently, if the parties do not reach agreement in their negotiations by the expiration date, the parties may resort to a strike or lockout even though the contract remains in effect.[6] Under my colleagues' interpretation of the contract, however, section 3 is a useless provision because the parties can, through section 2, terminate the no strike/no lockout provision at the bargaining table by ''introducing'' that subject into negotiations.

My colleagues argue that section 3 is consistent with the view that the parties contemplated that negotiations pursuant to section 2 would be free of constraints. Thus, under their view, it must follow that section 2 negotiations are actually no different than section 1 negotiations, because under section 2 the parties can negotiate changes to practically the entire contract, as they did here, and the Distributors are free to unilaterally implement changes after impasse. Contrary to my colleagues, however, I do not believe that the parties would have included the language of section 2 in the contract if its intended effect was simply to enable the parties to negotiate practically an entire new set of terms and conditions of employment on the exact same basis that the parties would be able to do if a section 1 notice had been given.

My colleagues also argue that section 4 supports their reading of section 2. Under section 4, the agreed on contractual changes are effective, retroactively, on April 1, the day after the contract's expiration date. My colleagues believe that section 4 makes sense only if the contract does not continue as to terms negotiated pursuant to section 2. I believe, however, that section 4 is equally applicable if the entire contract (with the exception of the no strike/no lockout clause) continues during section 2 negotiations. Under this construction, the contract remains in effect while the parties negotiate their changes or revisions, and any agreed on changes are deemed effective as of April 1.

The actions taken by the parties pursuant to the contractual provision at issue also make the instant case factually distinguishable from *Speedrack*. Specifically, neither the Union nor the Distributors ever treated section 2 as a provision similar to a *Speedrack* reopener, which serves to reopen only specific provisions of the

[3] My colleagues agree that under their reading of sec. 2, it is theoretically possible for a party to achieve the same result with a sec. 2 notice that it could achieve with a sec. 1 notice—total contract termination. But they dismiss the implications of this possibility because, they conclude, if a party sought such a result, it would obviously give a sec. 1 notice. In 1982, however, the parties negotiated a new contract in which the only notice given to open these negotiations was the Union's sec. 2 notice. The only possible reason for sending a sec. 2 notice rather than a sec. 1 notice in such a situation would be to ensure that if no agreement was reached, the old contract would automatically continue in effect. Thus, it is evident that although a party may seek to negotiate an entirely new contract, it may also desire to have the old contract remain in effect until agreement is reached on a new contract, or in case no such agreement is ever reached.

[4] The clause also allowed the parties to negotiate over ''foremen working.''

[5] In applying the *Speedrack* principle to the instant case, my colleagues contend that the instant contract does not contain language of limitation resembling that found in the contracts in *KCW* and *Barnes*. The language in those contracts, however, is no more specific in addressing the issue involved in *Speedrack* than is the language in the instant contract. Specifically, the critical language in *KCW* and *Barnes* provided that a notice of opening could not cause a termination of the agreement. It did not expressly state that in the absence of a notice of termination, the contract continues and a party may not unilaterally implement its final offer on reopened subjects after impasse. Nevertheless, the Board found that the respondents in those cases were not entitled to implement their final offers after impasse was reached in those negotiations. Thus, it is inconsistent for my colleagues to apply *Speedrack* rather than *KCW* and *Barnes* to the instant contract on the basis of any arguable differences in the clarity of the express language precluding contract termination in *KCW* and *Barnes* and in the instant case.

[6] Thus, even in a situation in which the contract remains in effect but the parties are negotiating pursuant to a sec. 2 notice, the parties may still agree to a temporary extension of the contract in order to keep the no strike/no lockout provisions of the contract in effect beyond the expiration date, while negotiations continue. This is, in fact, what happened during the 1982 negotiations.

contract. The Union's section 2 notices did not indicate the specific provisions it desired to change or revise. Indeed, in these negotiations, and in all of the previous negotiations which were held pursuant to a section 2 notice, the parties sought wholesale revisions to practically every substantive provision in the contract. Further, the end result of the previous negotiations was always a new, complete agreement covering terms and conditions of employment. Except for one difference, the negotiations were conducted *as if* the parties had terminated the contract and were negotiating a new one. The only aspect of section 2 negotiations which makes such negotiations different from section 1 negotiations is that, in section 2 negotiations, the contract remains in effect unless and until the parties agree on new terms. This is supported by the fact that section 2 makes no mention of any specific provisions which are to be ''reopened,'' the fact that none of the section 2 notices ever made reference to any particular subjects which were to be negotiated, and the fact that in the negotiations, both parties had initial proposals seeking to change or revise practically the entire contract.

Conversely, in *Speedrack* the contractual provision specifically defined the subjects which could be reopened (wages and foremen working), and the notice given pursuant to that contractual provision specifically stated *the* subject (wages) that the employer desired to negotiate. Further, the reopener provision in *Speedrack* provided the parties with the opportunity to engage in midterm bargaining to modify the wages provision for the remainder of the contract's term. The *Speedrack* provision was not, as in the instant case, tied to a renewal of the contract such that any agreed on changes were to take place during the new term of the contract. Thus, I find that *Speedrack* involved a completely different situation than the one that occurred in the instant case, and consequently the *Speedrack* principle does not apply. The contractual language involved here, as well as the actions of the parties, indicates that it was not the parties' intent to allow the contract, or any provisions other than the no strike/no lockout restriction, to be terminated by sending a section 2 notice. In *Speedrack* and its companion case *Hydrologics*, 293 NLRB 1060 (1989),[7] we noted that when engaged in reopener bargaining, the parties could contractually agree to constrain themselves from the use of the economic weapons of a strike, a lockout, and an implementation of a final offer after impasse. In the instant case, the express terms of the contract have carefully instructed the parties as to the exclusive weapons they may resort to in section 2 bargaining—a strike or lockout after the expiration date of the contract. Thus, the parties have contractually agreed that while both parties are free to give a section 1 notice of termination, if neither party gives a section 1 notice, they will be constrained from unilaterally abrogating the terms of the contract, even after impasse.

Although my colleagues find (and I agree) that the judge's interpretation of the contract is incorrect, their interpretation of the contract is *in effect* very similar to the judge's. Under either interpretation, the contract can be effectively terminated by sending a section 2 notice. Under the judge's interpretation, a section 2 notice operates to terminate the contract when one of the parties does not desire to continue the contract past the expiration date. Similarly, under my colleagues' interpretation of the contract, a section 2 notice can effectively terminate the entire contract if one of the parties does not desire to continue the contract and consequently ''reopens'' every subject during the negotiations.[8] As stated above, such an interpretation directly conflicts with the express language of section 1.

Further, as with the judge's interpretation, my colleagues' interpretation of the contract is one which *neither* of the parties argued to be correct.[9] Prior to the judge's decision, both parties argued that the only contractual provisions governing termination of any type were section 1 and section 5.[10] In *Speedrack*, as well as in most other cases involving contract interpretation, the principal issue involves deciding which party's interpretation of the contract is the correct one.[11] In applying *Speedrack* to the instant case, however, my colleagues have, like the judge, arrived at an interpretation of the contract that is contrary to the assertions of both the Distributors and the Union.

Finally, we need not be concerned about whether the contractual provision at issue confers a favored position on either of the parties. As noted above, the parties are free to contractually agree to engage in negotiations whereby the contractual terms remain in effect absent agreement otherwise. Further, the contract provides that if either party does not desire to negotiate in this fashion, it can simply give a section 1 notice and the contract will terminate on March 31. In fact, the Distributors were well aware of how to escape the constraints of section 2, as shown by the fact that in the previous negotiations the Distributors responded to the Union's section 2 notice by sending the Union a timely section 1 notice of termination. Had they simply

[7] In *Hydrologics*, the Board held, inter alia, that bargaining pursuant to a contractual wage reopener contemplated the potential use of economic weapons, and thus when a wage reopener provision was invoked, the employees were entitled to engage in a strike despite the existence of a no strike/no lockout clause in the contract.

[8] Of course, under my colleagues' interpretation, a party for all practical purposes terminates the contract under sec. 2 where, as here, a party introduces *almost* every substantive subject into negotiations.

[9] The judge reached his interpretation of sec. 2 sua sponte. The Respondents, however, have subsequently subscribed to it.

[10] Indeed, when in the previous negotiations the Union gave a sec. 2 notice, the Distributors responded by sending a timely sec. 1 notice of termination.

[11] In *Speedrack*, we agreed with the employer's position that invocation of the wage reopener provision entitled the employer to unilaterally implement its final offer on wages once the parties reached impasse.

done the same in these negotiations, they would have been free to implement their final offer at impasse.

As neither party gave a notice of termination pursuant to section 1 or section 5, and as the Union's section 2 notice did not operate to terminate the contract or any provision of the contract, I would find the contract remained in effect, and consequently the Respondent Distributors violated Sections 8(a)(5) and (1) and 8(d) of the Act by repudiating the union-security, dues-checkoff, and grievance-arbitration provisions of their respective contracts with the Union, by subsequently repudiating those contracts in their entirety, and by unilaterally changing terms and conditions of employment.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate applicants for employment concerning their union membership.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

N.K.S. DISTRIBUTORS, INC. D/B/A CENTURY WINE AND SPIRITS

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate applicants for employment concerning their union membership.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

DELAWARE BEVERAGE CO.

APPENDIX C

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate applicants for employment concerning their union membership.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

STANDARD DISTRIBUTING CO.

APPENDIX D

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WILL NOT interrogate applicants for employment concerning their union membership.

WE WILL NOT implement a stock purchase plan for employees without bargaining with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union concerning the institution of a stock purchase plan for employees, and if so requested by the Union, rescind our unilateral implementation of the plan.

N.K.S. DISTRIBUTORS, INC.

APPENDIX E

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate applicants for employment concerning their union membership.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WEST COAST INDUSTRIAL RELATIONS ASSOCIATION, INC.

Dennis P. Walsh, Esq. and *Barbara C. Joseph, Esq.*, for the General Counsel.

Robert F. Stewart, Jr., Esq. and *David M. Spitko, Esq.*, of Philadelphia, Pennsylvania, for the Respondent.

Hugh J. Beins, Esq., of Washington, D.C., and *Michael Ciabattoni*, of Wilmington, Delaware, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARVIN ROTH, Administrative Law Judge. These consolidated cases were heard at Wilmington, Delaware, on April 12 and 13, 1989. The charges and amended charges in Cases 4–CA–17616–1, 2, 3, and 4 were filed respectively on September 26, 1988, and January 10, 1989, and the charges in Cases 4–CA–17888 and 17889 were filed on February 9, 1989, all by General Teamsters Local Union No. 325, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (the Union). The consolidated complaint, which issued on March 28, 1989, and was amended on April 4, 1989, alleges that N.K.S. Distributors, Inc. d/b/a Century Wine and Spirits, Delaware Beverage Co., Eugene M. Tigani, Steven D. Tigani, J. Paul Tigani, J. Vincent Tigani, Jr., F. Gregory Tigani, J. Paul Tigani (U/W of Joseph P. Tigani), and Francis G. Tigani, a Partnership d/b/a Standard Distributing Co., and N.K.S. Distributors, Inc. (respectively, Century, Delaware Beverage, Standard and N.K.S., and collectively Distributors), and West Coast Industrial Relations Association, Inc. (West Coast, and collectively, with the Distributors, the Respondents), violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended. The gravamen of the complaint is that Respondents interrogated an applicant for employment concerning his union affiliation or membership, that Distributors repudiated their respective collective-bargaining contracts with the Union and provisions thereof, and implemented new terms and conditions of employment for unit employees, that Standard unilaterally reduced the workweek for certain of its unit employees, and that N.K.S. unilaterally instituted a stock purchase plan, all allegedly in violation of the Act. Respondents' answer denies the commission of the alleged unfair labor practices.

All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally and to file briefs. General Counsel, the Union and Respondents each submitted a brief.[1] On the entire record in this case[2] and from my observation of the demeanor of the witnesses, and having considered the arguments of counsel and the briefs of the parties, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENTS

Century, an unincorporated division of N.K.S., is engaged in the wholesale distribution of beer, wine, and spirits from a facility located in New Castle, Delaware. Delaware Beverage is a Delaware Corporation, also engaged in the wholesale distribution of beer, wine and spirits from a facility located in New Castle. Standard, a partnership, is engaged in the wholesale distribution of alcoholic beverages within the State of Delaware, from facilities located in Wilmington and Dover, Delaware. N.K.S., a Delaware Corporation, is engaged in the wholesale distribution of beer, wine and spirits from facilities located in New Castle and Milford, Delaware. In the operation of their respective businesses, the Distribu-

[1] The second sentence in fn. 4 of Union's brief is stricken as irrelevant and involving matters outside the record or any reported Board or court decision.

[2] Errors in the transcript have been noted and corrected.

tors each annually purchase goods and materials valued in excess of $50,000 directly from points outside of Delaware. West Coast, a California Corporation with its principal place of business in Los Gatos, California, is engaged in the labor relations consulting business, representing employers in collective-bargaining and other labor relations matters. In the operation of its business, West Coast annually receives in excess of $50,000 for performing services outside of California. At all times material, Distributors engaged West Coast as a labor relations consultant, and West Coast provided such services as their agent within the meaning of Section 2(13) of the Act. I find, as Respondents admit, that each of them is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION AND THE BARGAINING UNIT INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act. At all times material, the Union has been and is, the recognized and exclusive collective-bargaining representative of each of the Distributors' employees in an appropriate unit as defined in the most recent collective-bargaining contract between the Union and the Distributor (art. 3, sec. 1(a) and art. 2, sec. 2 of each contract). Each unit substantially consisted of warehouse and delivery employees.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background: Negotiations prior to 1988, and the Duration of the Contracts*

The Union has had a bargaining relationship with Standard for about 20 years, and for more than 30 years with the other Distributors. Until 1982 the Distributors were part of a multiemployer bargaining unit, and the employees were covered by the Teamsters' National Master Freight Agreement (herein sometimes NMFA) and the Philadelphia, Pennsylvania and Vicinity Local Cartage Supplemental Agreement. In 1982 the Distributors withdrew from the multiemployer unit. Thereafter, in 1982 and again in 1985, they negotiated individual contracts through coordinated bargaining. The Distributors bargained through one principal negotiator in their contract negotiations. The results were reduced to one document containing in essence a contract for each Distributor. In 1982 the parties incorporated the NMFA and area supplement by reference, as modified in their negotiations. However in 1985 the parties dispensed with this arrangement, and negotiated self-contained contracts. Most provisions were identical for all Distributors. Insofar as the provisions differed, the document indicated the Distributor or Distributors to which the particular provision was applicable. The most recent (1985) contract contained the following provisions with respect to duration:

ARTICLE 49

DURATION

Section 1.

The Agreement shall be in full force and effect from April 1, 1985, to and including March 31, 1988, and shall continue from year to year thereafter unless written notice of desire to cancel or terminate the Agreement is served by either party on the other at least sixty (60) days prior to the date of expiration.

Section 2.

Where no such cancellation or termination is served and the parties desire to continue said Agreement but also desire to negotiate changes or revisions in this Agreement, either party may serve on the other a notice at least sixty (60) days prior to March 31, 1988, or March 31st of any subsequent contract year, advising that such party desires to revise or change terms or conditions of such Agreement.

Section 3.

The Local Union as representative of the employees or the signator Employer shall each have the right to unilaterally determine when to engage in economic recourse (strike or lockout) on or after April 1, 1988, unless agreed to the contrary.

Section 4.

Revisions agreed on or ordered shall be effective as of April 1, 1988, or April 1st of any subsequent contract year.

Section 5.

In the event of an inadvertent failure by either party to give the notice set forth in Sections 1 and 2 of this Article, such party may give notice at any time prior to the termination or automatic renewal date of this Agreement. If a notice is given in accordance with the provisions of this Section, the expiration date of this Agreement shall be the sixty-first (61st) day following such notice.

The language of article 49, with dates updated, was taken from the National Master Freight Agreement, and was incorporated by reference in the 1982 contracts between the Distributors and the Union.

In the 1982 and 1985 negotiations the Distributors were represented by the law firm of Morgan, Lewis, and Bockius. By letter dated September 21, 1981, the Union opened the 1982 negotiations by notifying the Distributors of its ''desire to revise or change terms or conditions of ''the 1979–1982 contract (NMFA and area supplemental agreement). No other notices were sent by either side. By March 31, 1982, the expiration date of the contract, the parties had not reached agreement. The parties agreed to extend the contract until April 4, 1982, and thereafter from day to day, with advance notice of intention to engage in a strike or lockout. Union president and business representative Michael Ciabattoni testified in sum that the contract was automatically renewed, but that the parties agreed on an extension in order to waive their respective rights to a strike or lockout during the period of their agreed-on extension. The distributors did engage in a lockout, and in late May, 1982, the parties reached agreement on new, individual contracts. (Respondents offered to prove, and I accept the offer as true, that the parties negotiated both Union and employer proposals and agreed on

some employer proposals). In the meantime, a dispute arose between the parties over processing of certain grievances which the Union had submitted for binding arbitration. The Distributors, through their chief negotiator (Attorney O'Reilly of the Morgan firm) argued that the grievances were not subject to arbitration because there was no contract in effect. The Union, by Ciabattoni, asserted that the contract remained in effect because there was no termination under article 39, section 1 of the NMFA (counterpart to art. 49, sec. 1 of the 1985 contract), but only a reopener pursuant to section 2. The positions of the parties were set forth in correspondence to Transport Employers Association, the agency for hearing arbitration matters. The present record does not indicate what disposition was made of the grievances. In 1984, both sides sent notices. By letter dated October 30, 1984, Teamsters National associations covered by [NMFA] or by approved separate freight agreements'' that all Teamster Union signatories to such agreements desired to revise or change the terms and conditions of such agreements for the contract period commencing April 1, 1985, as provided in section 2 of the Duration article. By letter dated November 28, 1984, to the Union, Attorney Reagan of the Morgan firm, the Distributors' chief negotiator, notified the Union to: ''Please consider this letter as notice of termination of the agreement and thereafter the companies will not be bound by any agreement negotiated by any employer association.'' Ciabattoni testified that during the 1985 negotiations he told Attorney Reagan, in the presence of Distributor officials, that ''the only way there could be unilateral implementation was if in fact the termination notice was served,'' although the employers could lock out and the Union could strike without such notice. There was no strike or lockout. The parties continued to negotiate beyond April 1, 1985, under an extension agreement, and eventually agreed on a new contract. The contract provided among other things, for union security, checkoff of dues and initiation fees, and binding arbitration of grievances.

B. *The Current Negotiations, Alleged Repudiation of the Contracts, and Pertinent Unilateral Changes*

1. The facts

By letters dated January 4, 1988[3] the Union stated as follows:

> Please accept this letter as notice of our intent to change and/or modify the current labor agreement which expires on ''3/31/88.''
>
> This notice is being sent as provided for in the agreement and if there are any questions, please call this office.

The Distributors responded that they would be represented in the negotiations by chief operating officer Chris Thomas of West Coast. Thomas is a labor relations consultant, but not an attorney. By letters dated January 11 and 21 the Distributors requested in sum that negotiations commence as soon as possible: ''In an effort to reach an early agreement and avoid bargaining beyond the expiration date.'' However negotiations did not commence until March 4. There were 19 bargaining sessions (March 4, 8, 22, 23, 29, 30, April 6, 19, 20, 27, 28, May 4, 17, 18, 26, 27, June 22, July 13, and August 24). Thomas was the Distributors' chief negotiator, and Attorney Hugh Beins was the Union's chief negotiator. Union President Ciabattoni also participated extensively in the negotiations. Ciabattoni and Thomas were the only witnesses who testified concerning the negotiations. The Union and the Distributors each submitted their initial contract proposals, covering a wide range of matters, both economic and noneconomic. The Union indicated that it would propose wage increases and improved fringe benefits. The Distributors proposed major revisions in the existing contract, covering the whole spectrum of contract matters, including substantial reductions in wages and fringe benefits. At the first session on March 4 Thomas said that the Distributors would not agree to an extension beyond expiration of the contract. At the second session on March 8, Beins proposed to extend the contract beyond the expiration date. Thomas rejected the proposal. Beins asked whether the Distributors had a lockout agreement. Thomas answered that they did not, that they were engaged in individual bargaining, and that he considered a lockout to be an ineffective weapon. At the fifth session on March 29, the Distributors presented a counterproposal, including a preface which Thomas read aloud to the Union. Thomas stated in part that he had repeatedly said that the Distributors wanted a contract which provided them with flexibility and reflected settlement trends in the beverage industry, and that he was unaware of any other group of employers in the industry who were required to operate under such a ''cumbersome contract'' as the existing contract, which was a ''variation on the Master Freight Agreement.'' Thomas said he was concerned because this was the last opportunity to discuss the contract before the expiration date. (The parties planned to devote the March 30 session to presentations on the Distributors' insurance proposals). By this time the parties had discussed all the Distributors' proposals. Thomas also read aloud the following portion of the Distributors' counterproposal: ''With respect to the expiration of the contract the employers *will not* agree to either an informal or formal extension of the contract. We suggest the Union consult with their counsel as to the legal significance of this position.'' (Emphasis in original.) Attorney Beins asked what this meant. Thomas answered that the union-security, checkoff, and arbitration obligations would die with expiration of the contract. Beins replied that Thomas was wrong. Beins did not explain his reply, and Thomas did not ask for an explanation. Ciabattoni testified in sum that he and Beins understood, and it was their interpretation of the contract that because neither party gave notice of desire to ''cancel or terminate'' the contract, i.e., a section 1 notice, the contract would automatically renew on April 1 for an additional year, except that absent agreement of the parties, they would, by reason of section 3, be free to engage in a strike or lockout on or after that date. Beins and Ciabattoni agreed to refrain from disclosing their interpretation of the contract to anyone (including the Union's negotiating committee) unless and until the Union filed unfair labor practice charges. Ciabattoni testified that Beins said he would tell Thomas if he asked.

By letter dated April 13, Thomas informed Attorney Beins that as of April 17, ''in accordance with'' *Bethlehem Steel Co.*, 136 NLRB 1500 (1962), the Distributors would no

[3] All dates in sec. III, B, and C of this Decision are for 1988 unless otherwise indicated.

longer honor the union-security and checkoff provisions. Thomas added that the Distributors would ''continue to abide by all other terms and conditions of the expired contract,'' subject to the Board's decisions'' in *Indiana & Michigan Electric Co.*, 284 NLRB 53 (1987), and *Columbus & Southern Ohio Electric Co.*, 287 NLRB 144 (1987). By letter dated April 15, Beins responded to Thomas' letter. Beins asserted that the Company's alleged shifting positions on union security and checkoff were unfair labor practices and ''indicative of the fact that you are engaged in surface bargaining.'' Beins specifically alleged that Thomas: (1) Initially and repeatedly stated unequivocally that the Distributors were canceling the union-security and checkoff provisions of the contract as of April 1; (2) in response to Beins' statement that cancellation was ''unilateral and an unfair labor practice,'' switched positions and said that the Distributors would continue to provide union security and checkoff; (3) subsequently failed to checkoff dues, but advised the Union and the employees that this was inadvertent and would be corrected in the next paycheck; and (4) now ''flip flop again without any negotiations or discussion.'' The parties next met in negotiations on April 19, at which time Beins and Thomas discussed the matter of union security and checkoff. Ciabattoni testified in sum that Beins reiterated the assertions in his April 15 letter, and asserted that the Distributors' unilateral refusal to honor union security and checkoff was ''a breach of the contract and unfair labor practice.'' Ciabattoni testified that he did not recall any reference to ''impasse,'' although someone may have used that term. Thomas testified in sum as follows: Beins said that the cases cited by Thomas in his April 13 letter were incorrect, because they did not apply to the situation. Thomas asked what was Beins' theory, whereon Beins replied that there was no impasse, and in the absence of impasse the Distributors could not make unilateral changes. I credit Ciabattoni. First, Thomas' version of the April 19 discussion was inconsistent with other testimony by him. Thomas testified that he raised the question of impasse in a letter dated May 26, based on the Distributors' ''final proposal'' presented on May 18. Subsequently, on redirect examination, in response to leading questions from company counsel, Thomas testified that Beins first raised the issue of impasse. Second, as will be further discussed, Thomas' version of the April 19 session was inconsistent with his May 26 letter, in which he made clear that he understood that Beins was asserting that the contract was extended. Third, Beins is an experienced and knowledgeable labor relations attorney. It is incredible that he would assert, or that Thomas would believe that he was serious in asserting, that with no contract in effect, an employer could not lawfully refuse to give effect to the union-security and checkoff provisions of an expired contract unless and until there was an impasse in bargaining.

The Distributors stopped checking off union dues in late April. On April 28 the Union filed grievances with the Distributors, alleging ''unilateral changes in wages, hours and working conditions, including but not limited to the elimination of Union Security and Checkoff provisions on or about 4/17/88,'' which were ''blatant breaches of the contract.'' On May 5 Beins requested that American Arbitration Association (AAA) docket the grievances for arbitration. By letters dated May 13 and 16 to AAA and Beins, respectively, Thomas restated the Distributors' position. Thomas asserted in sum that the contract expired on April 1, the parties did not agree to extend the contract, and therefore the Company was refusing to arbitrate these grievances, or any post April 1 grievances which did not ripen or accrue prior to that date. Thomas took the same position with respect to requests for arbitration concerning other matters, and continued to maintain this position until December 8. By letter dated May 20, Beins responded to Thomas' May 16 letter. Beins asserted that the Distributors' refusal to submit to arbitration was ''further evidence of your unfair labor practices,'' and that the cases cited by Thomas ''are distinguishable because before and after the contract expiration date you agreed to continue the contract in effect.'' Beins again argued that the Distributors flip-flopped on union security and checkoff, adding that ''there was no impasse or bargaining on those issues.'' Beins further stated ''that it has been our consistent position that you are committing unfair labor practices and breaching the contract.'' By letter dated May 26, Thomas replied that ''your theory regarding a contract extension is absolutely 'off the wall.''' Thomas pointed out that on March 30 he said that the Distributors would not agree to either a formal or informal extension of contract at its expiration. In light of these statements, it is evident that Thomas understood that Beins was asserting that the contract was still in effect. Thomas added that he did not agree with Beins' ''suggestion'' that there was no impasse in negotiations. Thomas stated that ''in fact an impasse has been reached.'' In his investigatory affidavit to the Board, Ciabattoni stated that Thomas originally agreed that the contract would remain in effect after April 1. Ciabattoni testified that he based this statement on his impression of the April 19 discussion concerning the Distributors' alleged inconsistent actions with respect to dues checkoff. Ciabattoni further testified that in the Union's view there was passive agreement, in that the Distributors never served termination notices. Ciabattoni further testified that various statements made or issued by the Union to the effect that the contract expired on March 31, were technically correct, because he referred to the initial term of the contract, and the contract renewed itself when neither party served notice to terminate the contract.

The parties continued to maintain their respective positions throughout the negotiations, with the Union continuing to assert that the Distributors were engaging in unfair labor practices and breaching the contract. On September 19 the Distributors unilaterally implemented their ''final offer.'' This offer encompassed numerous changes from the contractual terms and conditions of employment, including reduced wage rates, deletion of COLA, changed health and pension coverage, addition of a management rights clause, and uniform rules and regulations which contained a progressive discipline policy. Standard unilaterally implemented a retirement plan on September 19, the four Distributors unilaterally implemented health insurance plans on December 1, and N.K.S. unilaterally implemented a profit sharing plan on January 1, 1989. General Counsel's position that these changes were unlawful, is based on its contention that there was a contract in effect. General Counsel does not contend that absent a contract, there would be a lack of impasse which would preclude those changes.

As indicated, the Union filed its initial unfair labor practices charges on September 26. The charges did not indicate the Union's theory. By two letters dated December 8 to

Union President Ciabattoni, Chief Operating Officer Thomas stated that he understood that the Union raised a question with the Board ''if in fact my clients terminated or cancelled the contract as required by article 49 of the expired agreement.'' Thomas stated that at the first bargaining session on March 4, he said that the Distributors would not agree to extend the contract beyond its termination date of March 31, and that ''this fact was subsequently confirmed in writing'' at the March 29 session. Thomas stated that ''consequently, in accordance with Article 49, Section 5,'' the Distributors would deduct dues and fees not otherwise paid directly to the Union, pursuant to the checkoff provisions of the ''expired contract,'' for the months of April and May. Thomas added that the Distributors would also agree to submit to arbitration under the contract provisions, unresolved grievances filed during April and May, except for the grievances on union security and checkoff. Thomas asserted that the Distributors had remedied these latter grievances up to June 1, and beyond this point, the matter should be resolved in the Board proceeding. By letter dated January 17, 1989, Thomas told Beins that it was the Distributors' ''position that the collective-bargaining agreements in question were terminated pursuant to written notice given to you on March 29, 1988.'' Thomas asserted that: ''Thus, by the operation of Article 49, Section 5, the agreements expired on May 28, 1988.'' Thomas further stated in sum that in order to protect the rights of the Distributors, and without abandoning their position, ''this letter is to serve as a formal notice of our intent to terminate the collective-bargaining agreements,'' if in fact or law they exist, pursuant to article 49, section 1 of the contracts. Thomas testified in sum that until December, 1988, it was the Distributors' position that the contracts expired on April 1. Thomas testified that in October he learned of the Union's position from Respondents' counsel in this proceeding, and on learning that a complaint would probably issue, he switched positions to admit a 61-day extension of the contract on a ''worse case basis.'' Thomas admitted in his testimony that he did not mistakenly fail to give notice under section 1 of article 49, that his December 8 letters were his first reference to section 5, and that he never identified anything other than the Distributors' March 29 proposal as a notice under article 49.

2. Analysis and concluding findings

I find that General Counsel failed to prove that Distributors violated Section 8(a)(1) and (5) as alleged in the complaint. First, the Union's interpretation of article 49 of the contracts is incorrect. Article 49 delineates two types of notices which may be served by either party in anticipation of the expiration date of the contract, at least 60 days prior to that expiration date. Under section 1, either party may serve ''written notice of desire to cancel or terminate the Agreement.'' Under section 2, either party may serve notice of its desire ''to revise or change terms or conditions of such Agreement.'' Unlike section 1, section 2 does not require written notice. Section 2 notices are subject to two express conditions. A section 2 notice is appropriate where: (1) no section 1 notice has been served; and (2) ''the parties desire to continue said Agreement but also desire to negotiate changes or revisions in this Agreement.'' Thus, section 2 does not speak only in terms of the desire of the party serving the notice. Rather, section 2 is premised on the mutual desire of the parties to continue the contract in effect, subject to any changes or revisions which they may negotiate. Section 2 is silent as to the effect of the notice where one of the parties does not wish to continue the contract. The remaining sections of article 49 do not give a different meaning to section 2. Section 3, by its language, unequivocally purports to give both parties the right to engage in economic recourse (strike or lockout) on or after April 1, 1988, unless agreed to the contrary. Section 3 does not purport to depend on the giving of any notice. However the drafters of article 49 were undoubtedly aware that no party to a collective-bargaining agreement may resort to an economic strike or lockout without complying with the requirements of Section 8(d) of the Act. In effect, Section 8(d) is by operation of law written into every collective-bargaining contract. See *NLRB v. Lion Oil Co.*, 352 U.S. 282, 292–293 (1957). The language of section 3, and specifically its failure to refer to any form of notice, indicates that absent a section 1 notice or an agreement by the parties to continue the contract, termination of the contract would be governed by Section 8(d) of the Act and the law developed under that section. Section 4 of article 49 also tends to support this interpretation. Section 4 provides that revisions agreed on or ordered shall be effective as of April 1, 1988, or April 1 of any subsequent contract year. This provision would make no sense if a section 2 notice operated to continue the contract in effect without regard to the intent of the parties. Indeed it would run contrary to such an interpretation. Section 5 provides an alternative form of notice where either party failed to give a section 1 or section 2 notice. Section 5 is also silent as to whether a section 2 notice operates to terminate the contract. Section 5 simply provides that when a section 5 notice is given prior to April 1, the notice operates to move the expiration date forward for a period of 60 days from the notice. As Respondents correctly point out (Br. 26) section 5 does not require service of a written notice. However Section 8(d) of the Act requires written notice of ''the proposed termination or modification,'' 60 days prior to the expiration date. Therefore it is evident that section 5 was designed to give the parties an opportunity to perfect and give appropriate notices under Section 8(d) of the Act by extending the contract term to allow the required 60-day period.

Under the law developed with respect to Section 8(d), a timely notice of proposed termination or modification, including notice of a desire to negotiate changes or revisions in the contract, operates to terminate the contract as of its expiration date, absent a contrary agreement by the parties. *Paterson Parchment Paper Co. v. Papermakers*, 191 F.2d 252 (3d Cir. 1951); *Oakland Press Co.*, 229 NLRB 476 (1977), remanded on other grounds 606 F.2d 689 (6th Cir. 1979), on remand 249 NLRB 1081 (1980), remanded on other grounds 682 F.2d 116 (6th Cir. 1981), on remand 266 NLRB 107 (1983), enfd. 735 F.2d 969 (6th Cir. 1984); *Champaign County Contractors Assn.*, 210 NLRB 467 (1974); *New Jersey Esso Employees Assn. (Exxon Co.)*, 275 NLRB 216 (1985); and *South Texas Chapter, AGC*, 190 NLRB 383 (1971). The contractual provisions at issue in *Paterson Parchment Paper* and *Oakland Press Co.*, both contained clauses which were substantially identical to article 49, section 1 of the present contracts. The cases principally relied on by General Counsel (*KCW Furniture Co.*, 247 NLRB 541 (1980), enfd. 634 F.2d 436 (9th Cir. 1980); and

Robert A. Barnes, Inc., 268 NLRB 343 (1983)), are not in point. The contract clauses at issue in those cases specifically provided that a ''Notice of Opening'' could not operate to terminate the contract, and that the contract could be terminated only by a ''Notice of Termination'' or by mutual written agreement of the parties. No comparable provisions are involved in the present case. The history of negotiations between the present parties does not warrant a different result. In 1982 the parties disagreed as to the effect of a section 2 notice, and the question was not resolved. In 1985 the Distributors served a section 1 notice. However their counsel may have done so out of an abundance of caution to forestall possible litigation, or because the Distributors wished to specifically invoke section 1. Their action did not indicate that the Distributors agreed with the Union's interpretation of article 49.[4]

In the present case, the Distributors repeatedly made clear from the outset of negotiations that they would not agree to any for continuing the contract pursuant to section 2 of article 49 were not met, and the contract terminated on April 1 by reason of the Union's timely notice of intent to change or modify the contract. As the contract terminated on April 1, the Distributors were free to, as they did, cease giving effect to the union-security and checkoff provisions of the expired contract, and refuse to arbitrate grievances arising after April 1. As General Counsel does not contend and has not proven that in the absence of a contract, there was lack of impasse as of September 19, it follows that General Counsel failed to prove that Distributors acted unlawfully by implementing their final offer on and after that date. Therefore I am recommending that the pertinent allegations of the complaint be dismissed. Therefore also it is also unnecessary for me to consider the Distributors' alternative arguments that they gave notices which operated to terminate the contract, or that by reason of the Union's conduct, waiver, estoppel or laches, the Union is precluded from asserting that the contracts renewed on April 1.

C. *Alleged Interrogation*

The complaint alleges that on or about March 29, Respondents acting through their agent Garnie Hylton, interrogated an applicant for employment concerning the applicant's union affiliation or membership, and thereby violated Section 8(a)(1) of the Act. Respondents by their answer deny the allegations, except to admit that Hylton was and is at all times material a labor relations consultant of Pacific Northwest Employee Relations Association, a wholly owned subsidiary of West Coast, and an agent of Respondents within the meaning of Section 2(13) of the Act; and that on or about March 29, Respondents acting through Hylton interviewed an applicant for employment. The applicant in question was Richard Maule, who was the only witness to testify concerning the alleged interrogation. Maule did not know the name of the person who interviewed him. However, during investigation of the present charges, Chief Operating Officer Thomas presented the Board with a written statement of Hylton, in which he declared that he interviewed Maule. In light of this admission, I find that Hylton interviewed Maule as the agent of Respondents. In light of the circumstances of the interview, which will be discussed, I find that in any event the person who interviewed Maule acted as an agent of Respondents.

Beginning on January 17, the Distributors collectively placed advertisements in various newspapers for employees who in the event of a strike, would be hired as permanent strike replacements. (The Union never struck, and there was no lockout.) Maule had worked for Standard on a temporary basis for 2 days in early February, having been referred through the Union's hiring hall. In late March Maule responded to one of the ads, and applied to Standard for permanent employment. Maule filled out application and medical history forms, and was given a math test. He was set up for an interview. Maule was shown a written notice to the effect that the Distributors would be hiring permanent strike replacements in the event of a strike, but was not permitted to take the notice with him. On March 29 Hylton interviewed Maule. Hylton asked Maule whether he had ever worked for any of the Distributors, and how he worked for Standard. Maule answered that he worked through the union hall to temporarily replace an employee who was sick. At this point Hylton asked Maule if he was a union member. Maule answered that he was a member of 326. Hylton asked if Maule was willing to work for $9 or $10 per hour (reflecting the Company's economic offer, which was below the contract rates). Maule said that he was. Maule asked if he would have to cross a picket line if there were a strike. Hylton answered that he would. Maule responded that he had to work, and would work where he chose. Hylton said that the Distributors would be hiring immediately if there were a strike. A few days later Maule was notified that Standard hired a more qualified person. The complaint does not allege that Standard discriminatorily refused to hire Maule.

In questioning Maule, counsel for General Counsel identified areas of subject matter, but did not ask leading questions. I credit the uncontroverted testimony of Maule, and I find that Respondents violated Section 8(a)(1) by asking Maule if he was a union member. ''The Board has long recognized that questions involving union membership and union sympathies in the context of a job interview are inherently coercive and thus interfere with Section 7 rights.'' *Service Master*, 267 NLRB 875 (1983), and cases cited therein. It did not follow, from Maule's answer that he was referred through the union hall, that Maule was a union member or even a union supporter. Hylton, not Maule, injected the matter of union membership into the interview. He had no legitimate reason for asking Maule whether he was a union member. The questioning was coercive and unlawful. With reference to the liability of West Coast for the unfair labor practice. See *Blankenship & Associates, Inc.*, 290 NLRB 557 (1988), and cases cited therein.

[4] I adhere to my rejection of the Union's offer of proof, in the form of proffered testimony by Teamsters Attorney David Previant, to the effect that in his opinion the Union's interpretation of art. 49 was correct. Attorney Previant did not purport to base his opinion on any reported Board or court decision interpreting art. 49, or agreement between the parties, or any admissions by the Distributors or any negotiator speaking or acting on their behalf. Rather his testimony simply reflected his own opinion. Such expressions of opinion carry no evidentiary weight, regardless of the learning or experience of the witness.

D. *Alleged Unilateral Reduction of Workweek by Standard*

The complaint alleges that on or about January 9, 1989,[5] Standard repudiated the 5-day workweek provisions (art. 43, sec. 1(a)) of its contract, or in the alternative, reduced the workweek from 5 days to 4 days for certain unit employees, without prior notice to the Union and without affording the Union an opportunity to bargain concerning such action. The complaint alleges that Standard thereby violated Section 8(a)(5) and (1) of the Act. As there was no contract in effect, General Counsel's case necessarily rests on the alternative allegation. The contract is relevant insofar as it may reflect existing terms and conditions of employment.

Article 43, section 1(a) of the expired contract provided that: ''The regular workweek in local area operations shall consist of five (5) days of eight (8) hours each, exclusive of the meal period, Monday through Friday.'' Article 34, section 3(b) of the contract provided in part that: ''All starting times and classifications for employees shall be posted for bids and qualified employees, in seniority order, shall bid on such starting times and classifications.'' However the complaint is not based on an alleged unilateral charge from the procedure under article 34. Rather the complaint is based on an alleged unlawful unilateral reduction of the workweek. In practice, the parties have never interpreted article 43 as a guarantee of a 5-day workweek. As indicated, Standard has facilities in Wilmington and Dover. The Dover facility, since commencing operations in the late 1970s has operated on a normal 4-day workweek (Tuesday through Friday) without an objection from the Union. During busy periods (May to Labor Day and the holiday period in December) employees would be notified on a Sunday whether they would be needed to work the following day. At Wilmington Standard normally operated on a 5-day workweek. During the slow periods (January to May and September to December) employees would sometimes be notified not to report on Monday. Usually such notice was given for a particular day. However the Company introduced in evidence a notice posted on December 19, 1986, informing the employees that the Wilmington facility would be closed for deliveries on three Mondays in the following month. These notices might be given orally, or would be posted on the employees' time sheet or time cards. The Union was not given copies of these notices, and never grieved or otherwise objected to the procedure.

On January 9, Standard posted a notice to all warehouse personnel at Wilmington, informing them that beginning the week of January 15, 10 named employees plus all probationary employees would be scheduled to work a 4-day workweek (Tuesday through Friday). Fourteen other named employees were directed to continue working on Mondays, beginning at staggered times ranging from 7:30 a.m. to 10 a.m. Standard stated that the schedule would remain in effect until further notice. The Union was not given notice of this schedule. General warehouse manager Michael Fusca testified that the schedule was not permanent, but would continue until the facility got busy, and that in the meantime, employees would be notified if they were needed on a Monday. Fusca testified that the Company followed seniority in preparing the schedule, i.e., the least senior warehouse employees were told not to report on Mondays. Paul Houck, who is union secretary-treasurer and business agent assigned to Standard, saw the posted notice on January 10 when he came to the facility to discuss a grievance with Fusca. Houck told Fusca that he did not think Fusca ''had a right just to post the starting times for the individuals, but if he was changing any starting times, or positions that it would have to bid as it should be as the contract called for, and it also called for a 4-day work week.'' Fusca answered that business was slow and they were doing what they had to do. Houck asked for a copy of the notice, and Fusca sent him one. The Union did not file a grievance or request bargaining over the matter. On February 9 the Union filed an unfair labor practice charge (Case 4–CA–17888) alleging among other things that Standard illegally changed the workweek and workday for employees without any notice to or negotiations with the Union, and did so without regard to seniority.

I find that Standard did not violate the Act as alleged in the complaint, because the January 9 notice and its implementation did not constitute a unilateral change in terms and conditions of employment. As indicated, on September 19, 1988, Distributors implemented their ''final offer.'' Under that offer, Distributors proposed to delete the provisions of article 34, section 3 pertaining to bidding for starting times, and to amend article 43, section 1(a) to provide that: ''The specification of the work week shall not constitute a guarantee of same.'' As there were no contracts in effect on and after April 1, 1988, and General Counsel does not allege and failed to prove an absence of impasse, Distributors were free to unilaterally implement those proposals. Moreover, as indicated, the complaint is not based on any alleged failure to honor the provisions of article 34, and the parties never interpreted article 43 as a guarantee of a five day work week. The January 9 notice involved no substantive change in terms and conditions of employment. In essence Standard was simply conforming its procedure at Wilmington to that followed in Dover. Instead of informing its warehouse employees on a weekly basis whether they were needed on a particular Monday during the slow season, Standard reversed the procedure by informing some of them that until further notice, they were not expected to report to work on Mondays unless told otherwise. In substance, this was no different from past routine announcements, to which the Union never objected, informing employees not to report to work on certain Mondays. This does not mean that Standard had no obligation to meet with the Union on request, if the Union wished to discuss or negotiate concerning the notice. However the Union did not do so, but chose to rest on its contention that Standard unlawfully changed terms and conditions of employment. As no such change was involved, I am recommending that the pertinent allegations of the complaint be dismissed.

E. *Alleged Unilateral Institution of Stock Purchase Plan by N.K.S.*

The complaint alleges that on or about January 6, N.K.S. violated Section 8(a)(5) and (1) by unilaterally instituting a stock purchase plan. N.K.S. is a distributor for Anheuser-Busch, Inc. In December 1988, Anheuser-Busch invited N.K.S. to participate in its stock purchase plan. Under this plan, employees of the distributor may purchase Anheuser-Busch common stock through payroll deductions (minimum

[5] All dates in sec. III, D, and E, of this Decision are for 1989 unless otherwise indicated.

of $25 per month). Anhauser-Busch pays all brokerage fees and administrative costs, although there is a $50 fee for the Distributor to enter the program. N.K.S. comptroller Leo Renzette decided that N.K.S. should enter the program because it was a nice opportunity for the employees. By memo dated January 6 which was posted on bulletin boards, Renzette invited all employees (including nonunit) to participate in the plan on a voluntary basis. He indicated that enrollment cards must be completed and returned by January 20. No notice was sent to the Union. Renzette decided that N.K.S. would purchase the first share of stock for each employee who enrolled. The then cost of one share was $32.50. Renzette testified that he did so in order to facilitate entry into the plan, because the Securities and Exchange Commission required purchase of one share for each employee before the plan could commence, and it was easier to commence the plan with one check rather than collect checks from each employee. N.K.S. sent in its check on January 24. Sixty employees, including 24 unit employees, initially participated in the plan. Deductions commenced on February 2. Employees were free to withdraw at any time. Renzette testified that he did not notify the Union because he did not consider the plan as an employee benefit, and that it was ''de minimus.'' Neither the expired contract nor the Distributors' final offer covered such plans. N.K.S. has no history of giving gifts to its employees. There are union stewards and assistant stewards in the N.K.S. and Century (N.K.S. owned) units. Union President Ciabattoni testified that on January 19 a steward turned in a copy of the memo and an enrollment card to the union office, and that this was the first notice he had of the plan. Ciabattoni, as the business agent assigned to N.K.S., is the union official designated to receive notices from N.K.S. and Century. The Union never communicated with N.K.S. or Century about the matter, and took no action other than to file an unfair labor practice charge on February 9 (Case 4–CA–17889), alleging that N.K.S. unlawfully unilaterally instituted the plan.

I find that N.K.S. did not violate the Act as alleged in the complaint. I agree with General Counsel that a stock purchase plan is a benefit and term and condition of employment which is a mandatory subject of bargaining. *Foodway*, 234 NLRB 72, 76 (1978). I also agree that N.K.S. had a legal obligation to notify the Union of its intention or desire to institute the Anhauser-Busch stock purchase plan. However there was no violation because the Union slumbered on its rights. The Union learned of the plan on January 19. Although N.K.S. announced the plan on January 6 and solicited enrollment cards preliminary to entry into the plan, N.K.S. did not send in its own check until January 24, and no money was deducted from employees' paychecks until February 2. Nevertheless the Union did not even make a token protest against the N.K.S.' action. The Union did not, until it filed an unfair labor practice charge on February 9, give N.K.S. any reason to believe that it had any objection to the plan. Indeed the Union has never indicated what if any objection it has to the plan, other than the fact that it was unilaterally instituted. This is not the stuff of which unfair labor practices are made. A union, when it learns either directly from the employer or from unit employees, of an apparent unilateral change in terms and conditions of employment, must preserve its bargaining position by taking appropriate action, e.g., by asking to meet and discuss the matter, requesting further information, filing a grievance, or giving a satisfactory explanation for its failure to do so. The Union does not meet this obligation by simply making a token protest or filing an unfair labor practice charge. By failing to take appropriate action, the Union waives its right to bargain over the matter, and consequently to assert that the employer violated its bargaining obligation. *Clarkwood Corp.*, 233 NLRB 1172 (1977); *Talbert Mfg., Inc.*, 264 NLRB 1051, 1054 (1982); *Medicenter, Mid-South Hospital*, 221 NLRB 670, 678–679 (1975).[6] Therefore I am recommending that the pertinent allegations of the complaint be dismissed.

IV. THE REMEDY

As indicated, the only violation which I have found consists of Hylton's question about Maule's union membership. There is no allegation that Respondents took any action against Maule based on his answer. I find that this single isolated occurrence does not warrant a remedial order. Therefore I am recommending that the complaint be dismissed. *NLRB v. Pilot Freight Carriers*, 558 F.2d 205, 214 (4th Cir. 1977), cert. denied 434 U.S. 1011 (1978); *Thermalloy Corp.*, 213 NLRB 129, 133 (1974).

CONCLUSIONS OF LAW

1. Respondents are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material, the Union has been and is, the recognized and exclusive collective-bargaining representative of each of the Distributors' employees in an appropriate unit as defined in the most recent collective-bargaining contract between the Union and the Distributors (art. 3, sec. 1(a) and art. 2, sec. 2 of each contract).

4. Respondents have not engaged in the unfair labor practices alleged in the complaint, except for one isolated instance of interrogation which does not warrant the issuance of a remedial order.

[Recommended Order for dismissal omitted from publication.]

[6] In *Clarkwood*, the union involved protested the employer's contemplated actions. In the present case the Union did not even bother to do this much. I do not agree with General Counsel's argument (Br. 29–30) that *Talbert* and *Medicenter* are distinguishable because in the present case the Union did not have enough time to request bargaining. In *Talbert*, the union learned of announced reductions in the workweek as little as two days before some were to take effect. Nevertheless the Board found that the Union waived its right to bargain by failing to seek negotiations over the matter. I also do not agree with General Counsel's reliance on *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017–1018 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983). In *Ciba-Geigy*, the union involved informed the employer that it needed time to review an absentee program which the employer had announced it intended to implement. The union also protested certain aspects of the program. Nevertheless the employer proceeded to implement the program. The Board found that the Union did not have an adequate opportunity to bargain over the matter. In the present case the union did not even bother to communicate with N.K.S.